TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 7, 1906.

(20,360.)

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SUPREME COURT OF THE UNITED STATES

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In the Court of Appeals of the District of Columbia.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

a Supreme Court of the District of Columbia.

No. 24683. Criminal.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 & 2 *Indictment.*

Filed in Open Court April 3, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, January Term, A. D. 1905.

DISTRICT OF COLUMBIA, *ss:*

The Grand Jurors of the United States of America, in and for the District of Columbia, aforesaid, upon their oath do present:

* * * * * * *

3 *Third Count.*

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That on the twenty-third day of November, in the year of our Lord, one thousand, nine hundred and three, and at the District

aforesaid, said Andrew A. Lipscomb and said Thomas M.
4–13 Fields were receivers, that is to say, were receivers under a certain order of the supreme court of the District of Columbia, holding an equity court, dated the sixth day of November, in the year of our Lord, one thousand, eight hundred and ninety-four, in equity cause number fifteen thousand, nine hundred and seven, and entitled The Washington Beneficial Endowment Association *versus* The Commercial Alliance Life Insurance Company; that on the said twenty-third day of November, in the year of our Lord, one thousand, nine hundred and three, the said Andrew A. Lipscomb and said Thomas M. Fields, as such receivers, had possession of a certain other large sum of money, to-wit, the sum of fifteen thousand, nine hundred and seventy-four dollars and seven cents, which said fifteen thousand, nine hundred and seventy-four dollars and seven cents, in money of the value of fifteen thousand, nine hundred and seventy-four dollars and seven cents, being the property and moneys of the Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them, the said Andrew A. Lipscomb and said Thomas M. Fields, by virtue of their office and employment as such receivers, and that they, the said Andrew A. Lipscomb and said Thomas M. Fields, so having the said fifteen thousand, nine hundred and seventy-four dollars and seven cents in their possession as aforesaid on the said twenty-third day of November in the year last aforesaid, and at the District aforesaid, and while they were such receivers as aforesaid, did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the same; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

* * * * * * *

14 *Demurrer.*

Filed in Open Court, April 20, 1905. J. R. Young, Clerk

In the Supreme Court of the District of Columbia.

No. 24,683. Criminal Docket, No. —.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Separate Demurrer of Thomas M. Fields.

Comes here the defendant Thomas M. Fields, and, by leave of court first had and obtained, demurs specially and generally to the indictment in this cause filed, and to each and every count thereof, and says:—

1. That the said indictment is bad in substance.
2. That each and every count of the said indictment is bad in substance.

D. W. BAKER,
PHILIP WALKER,
Attorneys for Defendant Fields.

NOTE:—Among the matters of law intended to be argued and relied on, in support of the foregoing demurrer, are the following:

I. As to the indictment as a Whole, and to Each and Every Count Thereof.

a. No offence is charged under Section 841 of the Code of Law for the District of Columbia, or under any other law.

b. No description is given of the property, or of any property, of which the defendants are alleged to have been appointed receivers; nor are any facts alleged showing any connection between
15 such property and the money alleged to have been received by them; nor are any facts alleged showing any connection between such money and the receivership order alleged in the said indictment.

c. There is no direct allegation of the ownership of the alleged receivership property, or of the money alleged to have been received by the defendants.

d. There is no direct or specific allegation of the place where or the time when the alleged money or property came into the alleged possession of the defendants; nor is there any allegation of any facts showing that the said money was included in the receivership order alleged.

e. The facts alleged in the indictment do not show that the defendants ever had possession of the alleged receivership property or money, but only the custody thereof, if anything; the allegation of their alleged possession being merely an erroneous conclusion from the facts alleged.

f. The facts or particulars of the alleged receivership are not stated.

g. No facts or particulars are alleged to show that the defendants have converted or appropriated the alleged money to their own use, either fraudulently or unlawfully or otherwise; but only a mere conclusion is alleged.

h. There is no allegation of an intent to defraud; nor are any facts stated or direct allegations made showing any intent to commit any fraud in fact.

i. Neither said Section 841 of the said Code of Law for the District of Columbia, nor any other law, applies to receivers appointed before January 1, 1902.

16 *j.* The said Section 841 is unconstitutional and void, because the forfeiture clause thereof operates to deprive the citizens of their property without due process of law; it denies them the

equal protection of the laws; it inflicts cruel and unusual punishment; it takes private property for public or private use without compensation, and divests vested rights; especially so if given any retroactive effect.

* * * * * * *

D. W. BAKER,
PHILIP WALKER,
Attorneys for Defendant Fields.

17 *Order of Severance.*

Supreme Court of the District of Columbia.

TUESDAY, *April* 25, 1905.

The Court resumes its session pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Violation Section 841, Code.

UNITED STATES
vs.
ANDREW A. LIPSCOMB.

Come as well the Attorney of the United States as the defendant in proper person, according to his recognizance and by his Attorneys Messrs. Holmes Conrad, W. Walton Moore and F. Edward Mitchell; whereupon the defendant's motion for a separate trial coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and the same hereby is granted.

* * * * * * *

Order on Demurrer.

FRIDAY, *April* 28, 1905.

The Court resumes its session pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

18 Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker;

whereupon, the defendant's demurrer to the indictment coming on to be heard, and argued by counsel, it is considered by the Court, that as to Counts Nos. 4, 5, 7 and 8 of said indictment that said demurrer be and it hereby is sustained, and that as to Counts Nos. 1, 2, 3 and 6 that said demurrer be and it hereby is overruled and the defendant is ordered to appear before this Court to plead to Counts Nos. 1, 2, 3 and 6 of said indictment.

19 *Motion for Commission, &c.*

Filed in Open Court May 3, 1905; J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683, Criminal Docket No.—.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant Thomas M. Fields, and moves the court as follows:—

1. For a commission to examine as witnesses in his behalf upon interrogatories thereto annexed, William T. Gilbert and Henry D. Hotchkiss, both of whom are material witnesses for this defendant, and reside beyond the District of Columbia, in the City of New York, in the State of New York.

2. For letters rogatory to take the testimony of Charles F. Miller as a witness in behalf of this defendant upon interrogatories and cross-interrogatories filed in this court and transmitted by this court under said letters rogatory, the said Charles M. Miller being a resident of and now to be found in the City of London, England, and being a material witness for this defendant.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is one of the defendants in this cause, and the defendant named in the foregoing motion; that the said persons therein named are material witnesses for this defendant; that the said Henry D. Hotchkiss and William T. Gilbert reside beyond the District of Columbia, and are residents of the City of New York in the State of New
20 York; that the said Charles F. Miller resides and is now to be found in the City of London, England. That the address of the said Henry D. Hotchkiss is No. 35 Liberty Street, in said City

and State that the address of the said William T. Gilbert is No. 256 Broadway, in the said City and State; that the address of the said Charles F. Miller is care if R. Hooe & Co., London, England. That by the testimony of the said Hotchkiss and Gilbert, and by the documentary evidence to be produced by them and annexed to and made a part of their depositions, this defendant will prove that none of the persons or corporations named in the remaining counts of the indictment in this cause had any ownership in or of the money as alleged in the said indictment; that by the said Miller this defendant will prove that a large part of the said money lawfully passed into the exclusive manual custody and control of Andrew A. Lipscomb, named in the said indictment, for the sole purpose of *bona fide* investment thereof by him in certain safe securities, and that this defendant did not convert or appropriate the same or any part thereof to his own use; that the said indictment was only filed on April 3, 1905; that since that time this defendant has been fully engaged in the preparation of and effort to sustain his demurrer thereto; that this defendant desires a trial of this cause at as early a date as he can properly prepare his defense; that the present motion is made at the earliest practicable opportunity; that it is made in good faith and is not made for the purpose of delay; and that this defendant cannot safely go to trial without the testimony of each and all of the said witnesses.

THOMAS M. FIELDS.

Subscribed and sworn to before me this 3rd day of May, A. D. 1905.

IRWIN H. LINTON,
[SEAL.] *Notary Public.*

21 The United States will please take notice that the foregoing motion and affidavit will be presented to Criminal Court No. 1, on Thursday, May 4, A. D. 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of a copy of foregoing motion, affidavit and notice is hereby acknowledged this third day of May, A. D. 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

22 *Order Granting Motion for Commission.*

Supreme Court of the District of Columbia.

THURSDAY, *May* 4, 1905.

The Court resumes its Session pursuant to adjournment, Mr. Justice Wright, presiding.

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker; whereupon the defendant's motion for a commission to examine as witnesses for the defendant upon interrogatories to be filed herein, William T. Gilbert and Henry D. Hotchkiss both residing in the City of New York, and for letters rogatory to take the testimony of Charles F. Miller, residing in London, England, a witness for the defendant upon interrogatories and cross-interrogatories to be filed herein; coming on to be heard, it is considered by the Court that said motion be and it hereby is granted, and Ordered that upon application of defendant, process issue commanding said William T. Gilbert and Henry D. Hotchkiss to appear at the trial of this case.

23 *Motion for Bill of Particulars, &c.*

Filed in open court May 4, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683. Cr. Doc. No.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant Thomas M. Fields, and moves the court for an order requiring the plaintiff to furnish him a bill of particulars setting forth the details of the receivership order and property, and of the ownership and converting and appropriating, alleged in the indictment filed in this cause; and also setting forth how and when the alleged money or property came into the alleged possession of the defendants, and what connection if any, existed between the said money and the said receivership order and property; for that the

said matters and things are alleged only generally and inferentially in the said indictment, but are necessary to be known in detail to this defendant so that he may properly prepare his defense, and in order to avoid any liability to be surprised at the trial by evidence for which he may be unprepared.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the defendant named in the foregoing motion; that the bill of particulars requested thereby is essential to enable him to
24 prepare properly for the trial of this case, and that without such particulars he is liable to be surprised and unprepared to meet the evidence that the plaintiff may offer at the trial, as he will not know until then what such particulars are. Affiant further says that the said motion is made *bona fide,* and not for the purpose of delay.

THOMAS M. FIELDS.

Subscribed and sworn to before me this Fourth day of May, A. D., 1905.

J. R. YOUNG, *Clerk,*
By J. W. LATIMER, *Ass't Clk.*

The plaintiff will take notice that the foregoing motion and affidavit will be called to the attention of Criminal Court No. 1 on Monday, May 8, A. D., 1905, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of copy of foregoing motion, affidavit and notice acknowledged this Fourth day of May, A. D., 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

25 *Motion for Return of Papers, &c.*

Filed in Open Court May 4, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683, Cr. Doc. No. —.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant Thomas M. Fields, and moves the court for an order requiring the Attorney of the United States for the District of Columbia to return and restore forthwith to the office of the clerk of this court, and to the files of said office all of the original papers and records in Equity Cause, No. 15907, mentioned in the indictment in this cause filed, which papers and records the said Attorney now has and for some time past has had in his exclusive possession and control; for that it is highly necessary that the defendant and his counsel shall have access to and be permitted freely to examine and inspect the said papers and records in order to prepare properly for the trial of this case.

D. W. BAKER.
PHILIP WALKER.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the defendant named in the foregoing motion; that upon information derived from the clerk of this court, and belief, the Attorney of the United States for the District of Columbia
26-35 has now, and for some time past has had, in his exclusive possession and control, all of the material papers and records in Equity Cause No. 15907, mentioned in the said indictment; that this defendant and his counsel desire to examine and inspect the said papers and records in a free, unembarrassed and lawful manner; that in order properly to prepare for trial, it is very necessary that this defendant and his counsel shall have access to and be permitted freely to examine and inspect the said papers; that they have a lawful and just right so to do; and that for these reasons the said papers should be returned at once to the clerk's office where they lawfully belong.

THOMAS M. FIELDS.

Subscribed and sworn to before me this Fourth day of May, A. D., 1905.

J. R. YOUNG, *Clerk,*
By J. W. LATIMER,
Ass't Cl'k.

The Attorney of the United States for the District of Columbia will please take notice that the foregoing motion and affidavit will be presented to Criminal Court No. 1 on Monday, May 8, A. D., 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of copy of foregoing motion, affidavit and notice acknowledged this Fourth day of May, A. D., 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

* * * * * * *

36 *Motion for Continuance, &c.*

Filed in Open Court May 8, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683, Cr. Doc. No. —.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant, Thomas M. Fields, and moves the court to continue the trial of this cause for a reasonable time, for the reasons set forth in the affidavit filed herewith as a part hereof.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says as follows:

That the indictment in this cause was only returned and filed on April 3, 1905; that on April 5, 1905, this defendant gave bail, and on April 17, 1905, pleaded the general issue thereto, with leave of court to withdraw his plea and demur; that at the same time the U. S. Attorney gave notice that he would call this case for trial immediately after another case set for April 25, 1905; that on April 20, 1905, this defendant withdrew his said plea, and demurred to the said indictment; that on April 21, 1905, the U. S. Attorney notified this

defendant's attorneys that he would call up said demurrer on
37 April 25, 1905; that on April 25, 1905, the hearing of said demurrer was postponed by consent of counsel until the next day; that on April 26, 1905, this defendant and his counsel appeared, prepared to present the said demurrer, but, at the instance of the U. S. Attorney, and by consent of counsel, the hearing was again postponed until April 28, 1905; that on said last-mentioned date the said demurrer was sustained in part and denied in part; that immediately thereafter this defendant's counsel gave notice in open court that they would apply to the Court of Appeals for a special appeal from that part of the order over-uling the said demurrer, upon the reconvening of that court on May 2, 1905; that, at the same time, the U. S. Attorney gave notice that he would call this case for trial on Monday, May 8, 1905; that on May 2, 1905, a petition and brief for such special appeal were duly presented to the said Court of Appeals, which petition was denied later in the same day; that on the next day, May 3, 1905, this defendant filed his motion and affidavit for an order for a commission and letters rogatory to take the testimony of certain material non-resident witnesses, two being in New York, and one in London, England; that on the following day, May 4, 1905, the said motion was granted; that on the said May 4, 1905, being Thursday, this defendant filed his motion and affidavit to require the U. S. Attorney to return to the office of the clerk of this court, the papers and records in Equity Cause No. 15907 recited in the said indictment; that at the same time this defendant also filed his motion and affidavit for a bill of particulars; that said two last-mentioned motions were noted for hearing on May 8, 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard; that before 12
38 o'clock M. on May 6, 1905, this defendant's interrogatories under the said commission and letters rogatory were duly filed in the clerk's office, and copies thereof served on the U. S. Attorney; that this court was not in session on May 5 and 6, 1905; and that affiant hereby expressly refers to the said papers and proceedings in this cause, and makes the same part hereof.

Affiant further says that the proceedings aforesaid have required much time and labor of his counsel and himself; that many consultations have been held both day and night between said counsel and affiant regarding the details of the law and facts of this cause and by way of due preparation for hearing, and they have exercised the utmost diligence in the matter; but notwithstanding this, they are not at all properly prepared for trial on May 8, 1905.

Affiant further says that a distinct, positive and irreparable injury will be done him by forcing him to trial on May 8, 1905; that the testimony of his said non-resident witnesses is material to his defense, and he cannot safely go to trial without it; that it has required some time and effort on the part of affiant to locate Charles F. Miller, named in the said motion for letters rogatory, as the said Miller left this District in the year 1904 to go to Lisbon, Portugal, and, on information and belief, will not return until about two years from now; and that

the said Miller is not absent by any procurement or connivance of this defendant.

Affiant further says that he has already stated of record in this cause the specific facts which he expects to prove by the said Miller, and by Henry D. Hotchkiss and William T. Gilbert, who are
39 named in the said motion and affidavit of May 3, 1905, and he hereby again refers for this purpose, to his said motion and affidavit; that the said William T. Gilbert is the same William T. Gilbert named as receiver in the second count of the said indictment as the owner of the moneys therein alleged to have been converted; that by the said Hotchkiss and Gilbert affiant expects to disprove any evidence that the Government may offer tending to show that any of the persons or corporations named in the first, second, third and sixth counts of the said indictment had any owership or title or property or possession in, to or of the said moneys or any part thereof, either at the time laid in the said indictment or at any other time long prior thereto; and to prove the contrary of the allegations of the indictment as to ownership; and that whatever ownership or title or property or possession the said corporations and Gilbert ever had, ceased absolutely long before the date or dates of such ownership and converting as laid and has never since been reacquired in whole or in part by them or any of them; and that the persons named in the said sixth count never had any such ownership or title or property or possession whatever either on, or at any time prior to, the date or dates alleged in the said indictment. Affiant further says that the said Gilbert as receiver was a party to the said Equity cause No. 15907, and that the said Hotchkiss was of counsel for him therein; that affiant cannot meet the Government's proof of ownership of the Commercial Alliance Life Insurance Company or of William T. Gilbert, Receiver of said Company, as alleged in the first and second counts of the said indictment, by his own testimony or that of any witness resident in the District of Columbia, nor can he be safely or properly pre-
40 pared to meet any evidence on the part of the United States tending to prove the allegations of ownership in the third and sixth counts of the said indictment without the testimony of the said Hotchkiss and Gilbert; that affiant also expects to have produced and proved by them certain material documentary evidence bearing directly upon the question of ownership as alleged in the said four counts of the said indictment, which documentary evidence will be attached to and made part of their depositions and duly returned therewith; and that such parol and documentary evidence will be sufficient to overcome any evidence which the government may offer in support of any or all of the allegations of ownership in the said indictment; affiant being advised that said allegations are material.

Affiant further says that, as he has heretofore substantially stated of record in this cause, he expects to prove by the said Miller that a certain large part and specific sum of the moneys alleged in said indictment to have been converted, passed lawfully into the exclusive manual possession, custody and control of affiant's co-defendant on

or about June 20, 1903, for the sole purpose of *bona fide* investment thereof by said co-defendant in certain safe securities, and that the same never came into the exclusive possession or control of this defendant, and that this defendant did not convert the same or any part thereof to his own use—this proof to supplement other evidence proposed to be offered as to the lawful disposition of all of the moneys mentioned in the said indictment, so far as this defendant is concerned. Affiant further says that the said Miller is the only witness to corroborate this defendant as to the said part of the said moneys;

41 that the said testimony of the said Miller is especially material and necessary to this defendant for the reason that affiant's co-defendant has specifically stated and denied under oath, both in this case and in other proceedings, that he ever had exclusive possession or control or custody of any part of the moneys and sum mentioned in the said indictment, but that this defendant received and converted to his own use the whole thereof.

Affiant further says that he is advised that while it is proper that he should state herein the facts which he proposes to prove by his said non-resident witnesses, it is not necessary that he should recite at length the details of their evidence and of the documents tending to prove such facts; and affiant therefore refers for any such or further details, to his filed interrogatories to the said witnesses.

Affiant further says that the said testimony sought by the said commission and letter rogatory, is highly material to this defendant; that he has been guilty of no neglect, laches or delay in seeking said testimony; that it is relevant, competent, admissible and true, and can be had within a comparatively short time; that it is important and materially affects the innocence of this defendant; that it is not vague, nor remote, nor mere conclusion; that it is responsive, and consistent with affiant's defense; that none of said witnesses is incompetent; and that the denial of a continuance of this case until affiant can get the testimony of said witnesses will deprive him of a fair and impartial trial; that said commission and letters rogatory are compulsory process for obtaining witnesses in his favor, to which he is

42 entitled by the Constitution and laws of the United States; that to grant an order for such commission and letters rogatory without "reasonable time and opportunity to obtain the benefit of the same" is in effect a denial of defendant's right to compulsory process, and a nullification of any such order; that it is a human impossibility to have either the said commission or letters rogatory properly executed and returned by May 8, 1905—only four days after the order therefor, one of said days being a non-secular day and one-half or another being a legal half-holiday.

43 Affiant further says that by the said Gilbert and Hotchkiss among other things, he expects to prove that about eleven years ago the Washington Beneficial Endowment Association, named in the third count of said indictment, sold and by deed conveyed away absolutely all of whatever ownership, right, title and estate it ever had in the moneys and property mentioned in the said indict-

ment, and that it never thereafter reacquired the same or any interest therein; and that all of whatever ownership, right, title and estate the Commercial Alliance Life Insurance Company, named in the first count of said indictment, ever had in the said moneys and property absolutely passed away from said Company long ago, and that said Company never reacquired the same or any interest therein; and that all of whatever ownership, right, title and estate William T. Gilbert, Receiver of the Commercial Alliance Life Insurance Company, named in the second count of said indictment, ever had in the said moneys and property, was sold and conveyed away absolutely long ago to one Johnson, and that said Gilbert has never reacquired the same or any interest therein; and that affiant expects to produce or have produced by said witnesses and duly proved the said transfers; and that these acts and things occurred long prior to the date of the offense as alleged in the said indictment; and further that neither the persons nor corporation named in the sixth count of said indictment, nor any one of them, nor their alleged intestates, ever had any ownership, title, property or estate whatever in the said moneys or property at any time either on or prior to the date of the offense as laid in said indictment.

Affiant further says that immediately upon the return of said indictment he retained his present counsel in this case, and there has been no lack of diligence on affiant's part in this re-
44 spect.

Affiant further says that he has a good and valid defense to the said indictment; that the nature of a part of his defense is such that it will require a careful examination of an elaborate account beginning on or about November 6, 1894, and running from that date for about nine and one-half years; that it involves various witnesses and numerous material papers and transactions, both in and out of court; that many of such papers have become intermingled, through no fault of affiant, with a large mass of about twenty years' accumulation of other papers in other legal proceedings and affairs, and it will require some time and labor to find such papers required by affiant in this case; and that for this reason affiant has been unable to present or explain them to his counsel.

Affiant further says that the matters and things giving rise to the said indictment involve no less than six different suits in equity, and numerous different actions at law, and other proceedings in other courts; that the said equity suits are quite intricate, the equity cause mentioned in said indictment is very elaborate and highly complicated, and was instituted on or about October 6, 1894, and has been pending ever since; that said cause has been before the Court of Appeals three times, the Supreme Court of the United States once, and the Auditor of the court twice, with various results; that it is essential that affiant's counsel shall fully understand the details of all the said proceedings; that the U. S. Attorney has had all of the material papers and records in the said Equity Cause No. 15907 in his exclusive possession in his office ever since the said indictment

was returned, if not longer; that affiant and his counsel cannot properly prepare for trial without opportunity freely to inspect
45 and examine the said papers and records, as well as the papers and records in the other suits and actions and proceedings hereinbefore mentioned, which opportunity they have not had.

Affiant further says that another obstacle was an order of the U. S. Attorney to the Washington Loan and Trust Company (in which it will be claimed by the Government that the said moneys were) to seal and lock up closely certain checks and certificates of deposit alleged to be relevant, and the consequent action of said bank in following said order and in refusing to show such papers, and to give any information regarding them, to affiant or his counsel; that upon learning of such order from said bank one of affiant's counsel asked the U. S. Attorney for permission to inspect said checks and certificates and to get transcripts of the relevant ledger accounts in the hands of said bank, but the said U. S. Attorney replied that he preferred not to grant the request at that time, and to let it wait awhile, and accordingly it was not pressed; that only very recently has one of affiant's attorneys been permitted to see said checks and certificates in said bank, although it is necessary to the due preparation of this case for trial that affiant and his counsel shall know the details of said checks, certificates and accounts; and especially so as the said checks do not belong to the said bank and were not placed or left in its hands for the purpose of being used as evidence against him in this or any other judicial proceeding.

Affiant further says that the hereinbefore recited preliminary proceedings in this cause have occurred with such unusual haste and rapidity that they have occupied substantially all of the time which affiant or his counsel could possibly have given to this
46 case; that much time and labor was conscientiously devoted to the said demurrer, and that reasonable time and opportunity are now required to prepare the case for trial on the facts; that affiant's counsel do not yet know of the material facts or the details of such facts in this case, as neither affiant nor they have had any reasonable time to collect them or the parol and documentary evidence to support them.

Affidavit further says that since said indictment was filed he has been compelled to give some of his time and attention to calls made on him for papers and other information required in other proceedings pending in this and other local courts; that affiant has devoted on an average not less than fifteen hours per day to this case ever since the said indictment was rendered, and, on more than one occasion, twenty-four hours of the day; and, since said indictment was filed, it has been necessary for him to be absent twice from this District for several days, once in New York and once in Philadelphia, regarding this case.

Affiant further says that if said Hotchkiss and Gilbert were summoned to this District as witnesses in his behalf it would require some short time for them to produce the documentary evidence

required by them, as shown by the aforesaid interrogatories to be propounded to them.

In conclusion affiant says that this application for continuance is made in good faith, and not for the purpose of delay; and that this defendant desires a trial as soon as he reasonably can prepare for it.

And further affiant saith not.

THOMAS M. FIELDS.

Subscribed and sworn to before me this Eighth day of May, A. D., 1905.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, Jr., *Ass't Clk.*

47 DISTRICT OF COLUMBIA, *ss:*

Daniel W. Baker and Philip Walker, being first duly sworn, depose and say that they have carefully read the foregoing affidavit of Thomas M. Fields; that the matters and things therein stated in relation to them or either of them are true; that they are not prepared for trial of this case on May 8, 1905, although they have devoted all the time and attention to it that they reasonably could; that they have exercised unusual diligence in this cause and a reasonable continuance is absolutely necessary in order to prepare properly for trial; and that without such continuance they can be of no substantial service to the said defendant on a trial on May 8, 1905.

And further affiants say not:—

D. W. BAKER.
PHILIP WALKER.

Subscribed and sworn to before me this eighth day of May, A. D. 1905.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, Jr., *Ass't Clk.*

48 *Affidavit of U. S. Attorney as to Custody of Certain Papers.*

Filed in Open Court May 8, 1905. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

MAY 8TH, 1905.

No. 24683.

U. S.

vs.

THOMAS M. FIELDS.

DISTRICT OF COLUMBIA, *ss:*

Before the undersigned personally appeared Morgan H. Beach who being first duly sworn, deposes and says:

I am the United States Attorney in and for the District of Columbia, have read the affidavit of the defendant Thomas M. Fields filed this day for continuance: and deny that the defendant or any of his counsel have been denied access to any of the court records or proceedings in the cause in which the defendant was receiver: it is true that I have had such papers in my public office for some time past, but this was because they were needed there in preparing this case for trial and further because some of the papers had been lost or abstracted when they were in the file room of the Court; that the defendant and his Attorneys have been afforded all proper and reasonable facilities for examining said papers in the office of this affiant.

MORGAN H. BEACH.

Subscribed and sworn to before me this 8th day of May, 1905.
J. R. YOUNG, *Clerk.*
By F. W. SMITH,
Ass't Clerk.

49 *Motion for Return of Papers, &c. Overruled.*

Supreme Court of the District of Columbia.

MONDAY, *May* 8, 1905.

The Court resumes its Session pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker; and, thereupon, the defendant's motion to require the Attorney of the United States to return to the Clerk of this Court the original papers in his possession in Equity Cause No. 15907 coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and it hereby is overruled; whereupon the defendant's motion to require the Attorney of the United States to furnish him with a bill of particulars coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and it hereby is overruled; and, thereupon, the defendant's motion for a continuance of this case coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and it hereby is overruled; whereupon for plea to said indictment as to Counts Nos. one (1), two (2), three (3) and six (6) the defendant says that he is not guilty in

manner and form as charged therein and for trial puts him-
50 self upon the country and the Attorney of the United States doth the like; and, thereupon, the said defendant being called for trial, it is ordered that a jury be empannelled and the members of the regular Petit jury being called, the panel is exhausted by reason of challenges without completing the jury; and, thereupon, the Court orders the Marshal to summon a talesman from the bystanders, and the Marshal summons Richard M. Lawrenson who, being a good and lawful man of the District of Columbia, being sworn upon his *voir dire*, and examined as to his competency as a juror, the panel is complete, which is as follows:

Charles L. Howard	Edgar C. Blackman	William H. Linger
Hiram R. Biddle	Charles Specht	Charles Linger
W. T. Brooke	Robert D. Howell	Harry T. O'Hara
Ernst L. Hibbs	Herman J. Waltz	Richard M. Lawrenson

who, being sworn well and truly to try the issue herein joined as to said Counts Nos. One (1), two (2), three (3) and six (6), after hearing the evidence in part, are respited until the meeting of the Court to-morrow.

Memorandum.

May 10, 1905.—Summons issued for George H. Tichenor and Daniel McConville witnesses for the defendant and Marshal's return of same date "not to be found."

51 *Verdict, &c.*

Supreme Court of the District of Columbia.

MONDAY, *May* 15, 1905.

The Court resumes its Session pursuant to adjournment, Mr. Justice Wright, presiding.

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come again the parties aforesaid in manner as aforesaid and the jury that was respited on Friday last; and, thereupon, after arguments of counsel and charge by the Court the jury, upon their oath say, that the defendant is guilty in manner and form as charged in the third (3d) Count of said indictment, but not guilty as charged in the first (1st) second (2d) and sixth (6th) Counts thereof; whereupon the Attorneys for the defendant move the Court to fix the amount of the bail in this case, which motion is granted, and said bail is fixed in the sum of Ten thousand dollars ($10,000); and

thereupon, the defendant enters into a recognizance in the sum of Ten thousand dollars ($10,000) with *The Title Guaranty and Trust Company of Scranton, Pa.* as his Surety approved by the U. S. Attorney, for his said defendant's appearance in this Court from day to day during the present and its subsequent — and hear and receive the sentence of the Court in this case to be pronounced when required, or, if he depart the Court without leave.

The talesman sworn in this case is discharged from further service during this term of the Court and the Marshal is ordered to pay him the lawful fees for his attendance as certified to by the Clerk.

52 *Motion in Arrest of Judgment.*

Filed in Open Court May 19, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Criminal. No. 24683.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Motion in Arrest of Judgment.

Comes here now the defendant Thomas M. Fields, and moves the court to arrest the judgment on the verdict in this cause for the reasons following, among others:—

1. Because of fatal defects apparent on the face of the third count of the indictment in this case, which defects have been specifically stated in clauses A to J, both inclusive, of paragraph I of this defendant's demurrer thereto filed herein on April 20, 1905, which part of said demurrer is hereby referred to and made a part hereof for a specific statement of such defects.

2. Because Code Sec. 841 is unconstitutional and void in that it attempts to make a receiver or other fiduciary guilty of embezzling his own property, by forfeiting all right or claim to any vested commissions, costs and charges, and declaring him guilty of embezzlement of the entire amount or value of the money or other property coming into his possession.

3. Because the third count of the said indictment fails to allege that this defendant ever qualified as a receiver under the order therein recited.

4. Because the third count of the said indictment fails to show that the court had jurisdiction to pass the order therein alleged.

53 5. Because of other defects apparent on the face of the third count of the said indictment.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

The Attorney of the United States for the District of Columbia will take notice that the foregoing motion will be called to the attention of Criminal Court No. 1 on Friday, May 26, 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for the said Defendant.

Service of copy of foregoing motion and notice acknowledged this nineteenth day of May, 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

K.

54 *Motion for New Trial.*

Filed in Open Court May 19, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Criminal. No. 24683.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Motion for New Trial.

Comes here now the defendant Thomas M. Fields, and moves the court to set aside the verdict against him in this cause and to grant a new trial, for the reasons following, among others:—

1. Because of the defendant's exceptions duly taken to:—

A. The rulings of the court on the defendant's motions for (1) a bill of particulars; for (2) the return to the clerk's office of the papers and records in Equity Cause No. 15907; and for (3) a continuance.

B. The rulings of the court on the defendant's objections to the evidence.

C. The rulings of the court on the defendant's objections to the conduct of the United States Attorney.

D. The rulings of the court in refusing the defendant's prayers.

E. The rulings of the court in granting the Government's prayers.

F. Other rulings of the court.

2. Because the verdict is contrary to the law.

3. Because the verdict is contrary to the instructions of the court,

and specifically defendant's prayers Nos. VII, X and XII, which were granted by the court.

55 4. Because the verdict is contrary to the evidence.

5. Because the verdict is contrary to the weight of the evidence.

6. Because secondary evidence of the alleged certificate of incorporation of The Washington Beneficial Endowment Association was admitted, over this defendant's objection, when no sufficient foundation for such secondary evidence had first been laid, and the Attorney for the United States had the paper purporting to be the original certificate of such incorporation in his actual and exclusive possession and control throughout the entire trial and for about two months prior thereto, and no proof whatever was offered of the execution of the said original certificate, nor of the correctness of such secondary evidence.

7. Because of improper conduct of the United States Attorney in stating to the court that said original certificate had been lost and in offering evidence tending to satisfy the court of such loss, and in offering and using secondary evidence thereof when he knew or should have known that the paper purporting to be the original certificate was then, and for some time past had been, in his own possession; and in arguing to the jury that this defendant forged his co-defendant's name to the certificate of deposit of November 8, 1901, when all the evidence proved the contrary; and in charging in argument that this defendant had robbed widows and orphans while asserting at the same time that the moneys involved were the property of the said Association and not of any widows and orphans; and in arguing that this defendant was a receiver of said Associa-

56 tion's property, whereas the order of appointment and all the other evidence in the case showed that if this defendant was a receiver at all he was a receiver of the property of the Commercial Alliance Life Insurance Company and not of the said Association; and in the repeated use of highly intemperate language against this defendant not based on the evidence; and in the said Attorney's vigorous defense of Mr. Lipscomb; all to the unjust prejudice of this defendant.

8. Because no legally sufficient or proper evidence was offered to prove that this defendant ever gave the bond expressly required by the order of appointment put in evidence, without which bond this defendant never became a receiver; the primary evidence being the original bond itself.

9. Because the evidence offered in this case shows that the court had no jurisdiction to pass the said order of appointment, or any of the other orders and decrees put in evidence in this cause; whereas the contrary should have been shown.

10. Because the Government was permitted to give evidence of numerous distinct acts of the defendant, each alleged to constitute embezzlement, and was not required to elect, and did not elect, to rest on any specific act and sum and date, and no conspiracy or sys-

tematic plan on the part of this defendant was either averred or proved in relation to the moneys mentioned in the indictment; and

11. Because the Government was allowed to give evidence tending to show that the specific sum charged against the defendants in the indictment was a mere balance left of various sums (proceeds of sale of realty, rentals, interest, proceeds of sale of personalty, assessments, etc.) received by the defendants at various times from different persons, part of which ($10,070.82) they had paid over.

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12. Because of fatal variance between the allegation that moneys were converted and the evidence tending to show that only checks or certificates of deposit, if anything, were converted.

13. Because much evidence was admitted under the four counts, and the case argued to the jury on the two counts, and then submitted to the jury on only one count, whereas much of such evidence and argument would have been wholly inadmissible if the case had been tried on the one count only, and was highly prejudicial to the defendant; and because much evidence exceedingly prejudicial to the defendant was admitted to show alleged conversions more than three years before the finding of the indictment and prior to January 1, 1902.

14. For other reasons to be stated at the hearing.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the defendant named in the foregoing motion; that during the trial of this case this defendant did not recall that he had ever seen the original paper purporting to be the certificate of incorporation of the Washington Beneficial Endowment Association, or that the said certificate ever had been filed in Equity Cause No. 15907 mentioned in the indictment herein, but he was of the impression that only copies of it had been filed in that cause, as recited in the various pleadings therein, including the original bill received in evidence in this case; that during the night of the day the verdict in this case was rendered he looked carefully through the printed record in that case for other matters, and in reading over the deposition therein of one Lawrence Gardner, claiming to be a former president of the said Association when in existance, and a witness in that cause, found it stated that the said Gardner produced the said paper purporting to be the original certificate and that it was filed with his deposition on June 3, 1895,—nearly ten years ago. On the next day, May 16, 1905, this defendant asked Mr. Hawken, the file clerk of this court, for Mr. Gardner's deposition, to which the said file clerk replied that it was with all the other papers in the case, which the United States Attorney then had and had had for about two months in his office.

58

At this defendant's request said clerk then went with affiant to said United States Attorney's Office, where said clerk quickly found said deposition with the other papers in that case, and upon examination, said paper purporting to be the said original certificate was found attached to said deposition, which was very near the top of the papers in a box in which said papers were kept. Neither affiant nor his counsel had any reasonable time or opportunity to examine any of said papers before or during the trial, except, during the trial, only those which were identified and those which were offered in evidence, all the papers in said cause other than those put in evidence having been kept in his own close custody by the United States Attorney, and daily brought to this court from and returned to his office at the opening and adjourning of this court during the trial; and that under the circumstances recited it was the right of this defendant to have the primary evidence against him, of which he was deprived by the aforesaid conduct of the
59 United States Attorney.

And further affiant saith not:—

THOMAS M. FIELDS.

Subscribed and sworn to before me this nineteenth day of May, A. D. 1905.

WILLIS W. PARKER,
Notary Public.

[SEAL.]

DISTRICT OF COLUMBIA, *ss:*

Philip Walker, having been first duly sworn, deposes and says, that he is one of the defendant's attorneys in this case; that this affiant, both before and during the trial of this case, did not recall that he had ever seen the original paper purporting to be the certificate of incorporation of the Washington Beneficial Endowment Association, nor that it had ever been filed in Equity Cause No. 15,907 mentioned in the indictment; nor does this affiant now recall such facts, although he has been informed since the trial, and now believes, that said paper was in fact filed in said cause, in which for a time he was the solicitor for certain claimants therein, though he took no active part either in the preparation or hearing of said cause. Affiant further says that he had no reasonable time or opportunity to study this cause or to examine any of the papers in said cause prior to or during the trial, except only, during the trial, those which were put in evidence, and those which were identified.

And further affiant saith not:

PHILIP WALKER.

Subscribed and sworn to before me this nineteenth day of May, A. D. 1905.

NORTON M. LITTLE,
Notary Public, D. C.

[SEAL.]

60 DISTRICT OF COLUMBIA, *ss:*

D. W. Baker, being first duly sworn, deposes and says that he is one of the defendant's attorneys in this case; that this affiant had no knowledge or information regarding the paper purporting to be the original certificate of incorporation of the Washington Beneficial Endowment Association, either before or during the trial of this cause; that he had no reasonable time or opportunity to examine any of the papers in Equity Cause No. 15907 before or during the trial of this case, except, during the trial, only such as were put in evidence and those which were identified. Affiant further says that he was not connected with said Equity Cause No. 15907 in any manner, and knows but very little about it, and most of that he learned during the trial of this case.

And further affiant saith not.

D. W. BAKER.

Subscribed and sworn to before me this nineteenth day of May, A. D. 1905.

J. R. YOUNG, *Clerk,*
By HARVEY GIVEN,
Asst. Clerk.

The Attorney of the United States for the District of Columbia will take notice that the foregoing motion and affidavits will be called to the attention of Criminal Court No. 1, Mr. Justice Wright presiding, on Friday, May 26, 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of copy of foregoing motion, affidavits and notice acknowledged this nineteenth day of May, A. D. 1905.

MORGAN H. BEACH,
K.
United States Attorney, D. C.

61 *Affidavit in Support of Motion.*

Filed July 21, 1905.

In the Supreme Court of the District of Columbia.

Criminal. No. 24683.

UNITED STATES
vs.
ANDREW A. LIPSCOMB and THOMAS M. FIELDS.

Affidavit of James S. Easby-Smith, Assistant Attorney of the United States in and for the District of Columbia.

James S. Easby-Smith, first being duly sworn, deposes and says, he is one of the assistant attorneys of the United States for the District of Columbia, and assisted in the prosecution of the above-entitled cause; that in the course of his preparation of the case he went to the office of the Recorder of Deeds of the District of Columbia and there had search made for the original certificate of incorporation of the Washington Beneficial Endowment Association; that he found that the said certificate had been filed and recorded in said office, but was missing from its place in the files; that for some time prior to the trial of said cause all the papers in the case of the Washington Beneficial Endowment Association *versus* The Commercial Alliance Life Insurance Company, Equity No. 15,907, and cases consolidated therewith, were in the possession of the United States attorney, said papers being very great in number and bulk and filling a two bushel box; that before discovering that the
62 aforesaid certificate of incorporation was missing from the files of the Recorder's Office affiant had made a careful examination of all the papers in said equity causes, and after said discovery, and upon being advised by several members of the bar of the District of Columbia that in all probability the original certificate of incorporation aforesaid would be found among the papers in said equity causes he made another very thorough and careful examination of all of said papers, but was unable to find said certificate; that among said papers are four bound books of testimony before the Auditor and certain examiners in chancery; that affiant not only looked through said bound books of testimony but read a great portion of same, especially those portions consisting of the testimony of the defendant Lipscomb, and the defendant Fields; but did not read all of said testimony and did not turn over every page in each of said books of testimony; that on the day following the verdict of guilty against the defendant Fields affiant was informed that said Fields had found the original certificate of incorporation aforesaid among the papers in said equity causes, which

had been in the possession of the United States attorney, and that upon being directed to the place where said certificate was found by said defendant Fields affiant found what appears to be the original certificate of incorporation filed as an exhibit, and bound into one of said books of testimony in connection with the testimony of Lawrence Gardner; that affiant did not know at any time before he found the said certificate, in the manner stated, that said certificate was among the papers in the possession of the United States Attorney.

Affiant further says that both before the trial of the defendant Fields, and during the trial, which occupied more than a
63 week, counsel for the defendant, and the defendant himself, were not denied access to the said papers, and were at liberty to examine them at any time they desired.

JAMES S. EASBY-SMITH,
Assistant Attorney of the United States in and for the District of Columbia.

Subscribed and sworn to before me this 26th. day of May, 1905.
J. R. YOUNG, *Clerk*,
By F. W. SMITH,
Ass't Clerk.

Motions (2) *Overruled, Sentence, &c.*

Supreme Court of the District of Columbia.

FRIDAY, *July* 28, 1905.

The Court resumes its Session, pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Convicted of Violation Section 841, Code D. C.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker; whereupon the defendant's motion in arrest of judgment and motion for a new trial coming on to be heard, and argued by counsel, it is considered by the Court that said motions be, and they hereby are overruled;
64 and, thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing, except as he has already said; whereupon it is considered by the Court that for his said offense the defendant be taken by the Warden to the United States jail in and for the District of Columbia, thence to the Peni-

tentiary (as designated by the Attorney General of the United States) there to be imprisoned, and kept at labor for the period of five (5) years, to take effect from and including the date of his arrival at said Penitentiary; and, thereupon, the defendant by his Attorney notes an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the defendant by his Attorneys moves the Court to fix the amount of the bond for costs on said appeal, which motion is granted, and said bond is fixed in the sum of one hundred dollars ($100) and, the Attorney of the United States in open Court waives the issuance of a writ of Citation; and, thereupon, the defendant by his Attorneys moves the Court to fix the amount of the bail in this case which motion is granted, and said bail is fixed in the sum of five thousand dollars ($5000); whereupon, the defendant enters into a recognizance in the sum of *Five thousand dollars ($5000) with the Title Guaranty and Trust Company of Scranton, Pa.* as his surety approved by the Court, if the said defendant fail to forthwith surrender himself to the custody of the Marshal of this District to be dealt with and proceeded against according to law in case the judgment appealed from shall be affirmed, or the appeal for any cause dismissed, or the judgment be reversed and a new trial ordered, or, if the said defend-
and depart the Court without leave; and, thereupon, the
65 defendant by his Attorneys submits to the Court his bill of exceptions taken during the trial of this case which is taken by the Court under consideration.

Memorandum.

August 17, 1905.—Appeal bond $100 with The Title Guaranty and Trust Co. of Scranton, Pa., as Surety Filed.

Prolongation of Term, &c.

Supreme Court of the District of Columbia.

TUESDAY, *September* 19, 1905.

The court resumes its Session pursuant to adjournment, Mr. Chief Justice Clabaugh, presiding.

* * * * * * *

No. 24683. Convicted of Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Upon motion of the defendant by his Attorney F. J. Hogan, Esq.,
it is by the court ordered that the April Term A. D. 1905 of
66 this Court be, and it is hereby prolonged for the period of thirty eight (38) days for the purpose of settling the bill of

exceptions in this case, and further Ordered that the time for filing the transcript of the record on appeal in the Court of Appeals of the District of Columbia be, and it is hereby extended to and including November 15, A. D. 1905.

* * * * * * *

NOVEMBER 10, 1905.

No. 24683. Convicted of Violation Section 841, Code D. C.

UNITED STATES
vs.
THOMAS M. FIELDS.

Now comes here the defendant by his Attorney Frank J. Hogan, Esq., and prays the Court to sign, seal and make a part of the record his bill of exceptions taken during the trial of this case and submitted to the Court on July 28th, 1905, now for then, which is done accordingly.

67 *Bill of Exceptions.*

Filed November 10, 1905.

In the Supreme Court of the District of Columbia.

Criminal, No. 24683.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Be it remembered that this cause came on for further hearing on May 8, 1905, at 10 o'clock A. M., before Criminal Court No. 1, Mr. Justice Wright, presiding; whereupon the defendant, Thomas M. Fields, presented to the court his motion and affidavit filed herein on May 4, 1905, for an order requiring the Attorney of the United States for the District of Columbia to restore forthwith to the clerk's office of this court all of the original papers and records in Equity Cause No. 15,907, mentioned in the indictment in this cause, it appeared by agreement of counsel that upon last Thursday the U. S. Attorney had invited the Defendant and his attorney to examine the papers at any time in his office. The U. S. Att'y states that he needs the papers in evidence and that counsel or defendant will be given them in any place where their loss will be guarded against; (D. T. W.) whereupon the court overruled the said motion, and the defendant duly noted his exception 1 to such ruling, as follows:

The COURT: This motion with respect to the restoration of the paper to the clerk's office is overruled. If counsel for the defendant will specify any particular paper or papers which
68 they desire amongst the papers which are in the possession of the District Attorney, such papers will be ordered into their possession and they may copy them; but so far as ordering indiscriminately and unidentified, a lot of papers out of the possession of the District Attorney is concerned, I do not think the motion should go that far.

Mr. BAKER: We only ask for the papers in the case. We do not ask for any private paper which the District Attorney may have in regard to this cause.

The COURT: The papers in the files of the Court are the papers you refer to?

Mr. BAKER: Yes.

Mr. EASBY-SMITH: There is a bushel-basket of them.

The COURT: My desire is not to subject the papers to loss. If counsel will designate any particular papers that they want to obtain copies of or inspect so that the District Attorney may keep track of the papers, that may be done; the counsel may examine the papers, as the District Attorney suggests, at any time they want; but I do not think counsel ought to take such an assortment of papers out of the custody of the District Attorney.

Mr. BAKER: We note an exception to the ruling of the Court.

Thereupon the said defendant presented to the court his motion and affidavit filed herein on May 4, 1905, for an order requiring the Government to furnish him with a bill of particulars; to the consideration of which motion the U. S. Attorney objected on the ground that he had not had two clear days' notice of such motion; but the court requested to hear the point of the motion and after
69 hearing the said motion read and argued, declined to grant it, because the court concluded that it was without merit; and then the said objection was by the court sustained; to which ruling of the court the defendant duly noted his exception 2. Then the said defendant presented to the court his motion and affidavits filed herein on May 8, 1905, for a continuance, but the court overruled the said motion, and the defendant duly noted his exception 3 to such ruling. Thereupon the said defendant was arraigned and pleaded not guilty to the first, second, third and sixth counts of the said indictment. The said defendant then moved the court to continue the case because the commission and letters rogatory, ordered on May 4, 1905, to be issued, had not been returned; the court tendered to the defendant compulsory process to secure the attendance of said witnesses; of which the defendant declined to avail himself; (D. T. W.) thereupon the court denied such motion; to which denial the defendant duly noted his exception 4. Thereupon a jury was empaneled and sworn to try the issues joined on the said counts between the United States and the

said defendant. The U. S. Attorney then opened to the Jury, but the defendant made no opening to the jury at any time.

In order to maintain the issues on its part joined, the United States then offers as a witness SAMUEL MCCOMAS HAWKEN, who, being first duly sworn, testifies that he is an assistant clerk of this court in charge of the files; that he has known the defendant for about eight years as a member of the bar of the Supreme Court of the District of Columbia; that all the papers filed in Equity Cause No. 15,907 have for about two months last past been in a box in the U. S. Attorney's office; that he recognizes the paper now shown
70 him, purporting to be a bill in equity, as one of said papers. The said paper is offered in evidence, and is as follows in substance.

An original bill in equity of The Washington Beneficial Endowment Association complainant, against the Commercial Alliance Life Insurance Company, a corporation organized under the laws of the State of New York, defendant, filed October 6, 1894, in the Supreme Court of the District of Columbia, alleging that on August 9, 1894, in pursuance of a prior agreement entered into between them, the complainant sold and conveyed to the defendant, all of the former's property and effects, consisting of its life insurance business and the good will thereof, and all the personal, mixed, and real estate then owned by the complainant, the said real estate consisting of premises No. 419 Tenth street, northwest, Washington, D. C., and being more particularly described as the north one-half of lot 11 in square 378; that complainant transferred and set over said real estate to defendant by deed "duly recorded in the Land Records of the District of Columbia, in Liber 1937, at folio 141;" that said sale and conveyance were procured by defendant's false and fraudulent representations as to its financial status; that the defendant was to issue in lieu of complainant's certificates of endowment, policies of insurance of the defendant for equal amounts; and that the defendant was to hold said real estate in trust for and subject to prior claims of certain beneficiaries named in said certificates of endowment, and to keep and operate an office and place of business for such purpose in the District of Columbia. The bill prays "that a decree may be passed annulling
71 the transfer of plaintiff to the defendant of all its property and the deed of its real estate as aforesaid and the same reconveyed by the court to the plaintiff;" and for process, injunction, receiver, and general relief. The bill also alleges that the Washington Beneficial Endowment Association, the complainant, is a corporation and was duly incorporated under the laws of the District of Columbia, on April 2, 1877, for the purpose of carrying on the business of life insurance; and that a copy of the certificate of incorporation is attached to and made a part of the bill, as is also a copy of the certificates of endowment issued by the said complainant to the insured.

The said witness then identified a paper shown him, purporting

to be an order, as another of said papers; and the same is offered in evidence, and is as follows:

Order Appointing Andrew A. Lipscomb, Thomas M. Fields, Receivers.

Filed November 6, 1894.

In the Supreme Court of the District of Columbia.

In Equity. No. 15907, Docket No. 37.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION
vs.
THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

Upon consideration of the motion of the complainant in this cause for the appointment of a receiver of the property involved in these proceedings and after due arguments—It is by the court, this 6th day of November, A. D. 1894, ordered that the said motion be, and it is hereby, granted, and that Andrew A. Lipscomb and Thomas M. Fields be, and they are hereby, appointed receivers to take
72 charge, custody, control and possession of all the property, real, personal, and mixed, including all books, documents, papers, vouchers, bills and correspondence, of any and every description and kind, which have been signed, conveyed, transferred or set over to the respondent The Commercial Alliance Life Insurance Company, by The Washington Beneficial Endowment Association, as fully set forth in these proceedings, and to hold the same subject to the further order of the court in the premises.

Before entering upon the performance of the trusts, hereby reposed in them, the said Andrew A. Lipscomb and Thomas M. Fields shall each file herein a bond with good and sufficient surety or sureties, to be approved by the court, conditioned for the faithful performance by each of them of his duties as such receiver, in the penal sum of twenty thousand ($20,000.00) dollars.

It is further ordered that the respondent, its agents, and attorneys be, and they and each of them are and is hereby required and commanded to forthwith deliver to the said receivers upon demand, all of the property and assets and documents as aforesaid, upon their qualifying as aforesaid, and they and each of them are and is hereby enjoined from in any manner interfering with the same or with the said receivers in connection with or concerning the same.

By the Court:

W. S. COX, *J.*

To the said order the defendant objected because it was passed before the Code D. C. took effect; because of variance between
73 it and the indictment in that the indictment charges that the defendants were receivers of money while the order shows

that they were not receivers of any money but of property, real and personal, and not the proceeds of it, which proceeds are not treated of by the Code; but the court overruled the objection and admitted the said order in evidence; and the defendant duly reserved his exception 5 to such ruling.

The said witness then identified as another of said papers a paper shown him, purporting to be an order passed in said equity cause on December 1, 1894, directing that the defendants in this case proceed "to sell at public sale all the real and personal property in their possession except the books, papers, and documents, the said real estate being described as the north half of original lot" 11 in square 378; and the said order was then offered in evidence.

To the said order of sale the defendant objected because it shows property coming into the hands of the receivers before the Code went into effect; because it is dated December 1, 1894; and because it shows on its face that the property is real estate, or part of it, and therefore not the money alleged in the indictment; but the court overruled the objection, and admitted the said order in evidence; to which ruling the defendant duly reserved his Exception 6.

Then the said witness identified as one of said papers another paper shown him, purporting to be a report of sale, filed May 13, 1895, by the defendants herein, reciting that they had sold the real and personal estate to James L. Norris for $22,210.00. The said report was then offered in evidence. The defendant objected to it for the reasons stated in his Exception 6; but the court overruled the objection and admitted the said report in evidence; to which ruling the defendant duly reserved his Exception 7.

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The said witness then identified as another of said papers a paper shown him, purporting to be an order *nisi* passed May 13, 1895, ratifying the sale recited in the said report of May 13, 1895, and the said order *nisi* was then offered in evidence; to which the defendant objected for the reasons stated in his Exception 6, because it is irrelevant and immaterial; because it does not relate to the property described in the indictment; because there is nothing to show that the receivers had any connection with the paper or anything to do with it; because this paper, the order *nisi*, states the price for which the property was sold, and is not competent as showing a fact of that kind; but the court overruled the objection and admitted the said order *nisi* in evidence; to which ruling the defendant duly noted his Exception 8.

The said witness then identified as others of said papers two papers shown him, purporting to be orders passed June 14 and 24, 1895, finally ratifying the sale of realty and personalty recited in the said report of May 13, 1895; and the said orders were then offered in evidence; to which the defendant objected for the reasons stated in his Exceptions 6 and 8; but the court overruled his objection and admitted the said orders in evidence; to which ruling the defendant duly took his Exception 9.

The said witness then identified as one of said papers another

paper shown him, purporting to be a decree, which was then offered in evidence, without objection, as tending to show a reference to the auditor, only; and which is in full as follows:

75 In the Supreme Court of the District of Columbia.
Equity. No. 15907.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION
vs.
THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

Equity. No. 15809.

ROBERT BALL ET AL.
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

Equity. No. 16072.

JAMES S. EDWARDS, Administrator,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

Equity. No. 16165.

MAN S. QUARLES, Administrator,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

The above causes, by the orders of this court heretofore consolidated, came on to be heard together by consent of all parties thereto at this term and were argued by counsel, and, upon consideration thereof, it is, this 27th day of June, A. D. 1896, adjudged, ordered, and decreed as follows:

First. That the deed from the complainant, The Washington Beneficial Endowment Association, to the defendant, The
76 Commercial Alliance Life Insurance Company, bearing date August 9th, A. D. 1894, set out and involved in these proceedings, be, and the same hereby is, set aside and held for naught.

Second. That the net proceeds of the real estate described in said deed, sold under the authority and direction of this court by the receivers appointed in said cause No. 15,907, and who are impleaded in certain of the other causes so as aforesaid consolidated therewith, be, and the same hereby are, declared, held, and decreed to be liable only for the payment of the claims under the certificates issued by the complainant, the said endowment association mentioned in the proceedings in said causes, in such shares and proportions as this court may, by its further decree, determine, upon the filing of the report of the auditor, as hereinafter provided.

Third. That said causes be, and the same hereby are, referred to the auditor of this court to state the account of said receivers and to report—after such notice to all concerned as he may determine—the claims under said certificates involved in these proceedings and such other similar claims under other certificates isued by said endowment association as may be submitted to or brought before him under this reference entitled to payment out of or from said net proceeds of the said sale and the several sums to which such claimants are entitled to be paid therefrom. For this purpose the auditor will consider the testimony heretofore taken in said causes and such other testimony as any of said claimants may produce before him.

Fourth. And the auditor shall also report as to such rea-
77 sonable costs, if any, in the causes consolidated including counsel fees, as, in his opinion, may be a proper charge upon the fund in question.

W. S. COX, *J.*

The said witness then identified as another of said papers a paper shown him, purporting to be a report of the defendants herein, filed March 20, 1897, as to the deposit of the said proceeds with the Washington Loan and Trust Company, at interest pending appeal; and also another paper shown him, purporting to be an order passed March 20, 1897, in said equity cause, authorizing and approving such deposit; and said report and order were then offered in evidence; to which and each of which the defendant objected for the reason that the said report and order preceded the Code; but the Court overruled his objection and admitted the said papers in evidence; to which ruling the defendant duly reserved his Exception 10.

The said witness then identified as being among said papers, but not filed in the clerk's office, three papers shown him, purporting to be reports of the defendants, dated, respectively, December 19, 1899, January 19, 1900, and July 5, 1900, and purporting to be signed by the defendants. The said witness identified this defendant's signature thereto as genuine. The said report of December 19, 1899, is followed by a statement of account charging the defendants with $24,456.83 gross proceeds of sale, rentals and interest, and crediting them with $4,608.55 for costs, charges, and commissions. The said report of January 19, 1900, refers to said report of December 19, 1899, and charges them with additional interest debit of $105.27, and credits them with $10.53 commissions. The said report
78 of July 5, 1900, refers to said two former reports, and charges the defendants with $20,211.47 as of and to July 5, 1900, for proceeds of sale, rentals, and interest, and credits them with $1017.89 for costs, charges, and commissions, leaving a net balance of $19,193.58 chargeable against them. The said three reports were then offered in evidence; to which and each of which the defendant objected because there is nothing to show that they are court papers and parts of the record in this equity cause; because it is a statement in regard to money that came into the defendant's hand prior to the

Code; and because they antedated the Code and the period of the statute of limitations; but the court overruled the objection and admitted the said reports in evidence; to which ruling the defendant duly reserved his Exception 11.

The said witness then identified as one of the said papers another paper shown him, purporting to be an Auditor's Report, filed July 31, 1900, which report is a follows in substance:

The Auditor states the receivers' account and the distribution under the said decree of June 27, 1896, and reports that said Association, in the course of its existence, acquired the said real estate; that before or about August 9, 1894, said Association entered into an agreement with said Commercial Alliance Life Insurance Company, of New York, to convey to said Company the personal property, business and good will thereof, and the real estate and all the effects real, personal, and mixed, of said Association; that said Association executed a deed of conveyance on August 9, 1894, by which it granted and conveyed to said Company the said real estate, being the north half of lot 11 in square 378, in this city; that the
79 sum paid by said Company to said Association as the consideration for said deed was $14000; that on August 30, 1894, Robert Ball and two others filed their bill in Equity Cause No. 15,809 against said Association, Lawrence Gardner, and said Company, reciting that complainants were certificate-holders in said Association, alleging the said agreement and transfer, that the same were a fraud on complainants and other like certificate-holders, and that the defendants thereby became trustees of said property for complainants; that said Association and Gardner answered this bill, admitting the conveyance of said real estate to said Company by deed of August 9, 1894; that in the meantime said Association filed a bill in Equity Cause No. 15,907 against the said Company alleging said agreement and conveyance, and asserting that said deed was procured by defendant by false and fraudulent representations, and praying that the said conveyance may, by decree of the court, be annulled, and the property reconveyed to the plaintiff; that subsequently petitions for leave to intervene were filed by various certificate-holders or creditors of the said complainant association; that said decree of June 27, 1896, does not include the personalty or its proceeds; that the intervenor Stuart, "distinctly recognizes the validity of the transfer to the Commercial Alliance Insurance Company, and counts upon the undertaking of that Company to hold the property in trust for her claim and that of all other beneficiaries under endowment certificates having liens by virtue of the by-laws;" that said Company purchased the said property, and not the stock, of said Association; that with the said $14000, the proceeds of its said sale, the
80 said Association redeemed and extinguished all of its outstanding stock; "that at the entry of the judgment (of Stuart against said Association on October 1, 1894) the Beneficial Endowment Association was not an existing corporation; that it was dissolved by the transfer of all of its property, assets, and business, and

by the fact that there was at that date neither stock of the Association nor stockholders; * * * that the stockholders parted wih the ownership of the stock on the 9th of August (1894), and, as the Association could not hold it, the inevitable result was its immediate extinguishment. It follows as a necessary consequence that the corporation was dead. It could not exercise any corporate function. It could not sue or be sued. No process of any kind could be served upon it. All suits against it abated, and with them the suit of Mrs. Stuart. I am reminded that in these consolidated cases the Association has been recognized by the courts as capable of suing and being sued. The want of such capacity by the civil death of the corporation was not made manifest to the court until the cases were submitted for adjudication. The condition was only developed in the proof then presented. Then the court had in the combination of suits sufficient proper parties, complete pleadings and satisfactory proof to sustain its jurisdiction and decree;" and that the distribution in Schedule B is at the rate of .0875%.

Schedule A of said report charges the defendants herein with $24,415.13 gross proceeds of sale, rentals, and interest, and credits them with $9,324.39 for costs, charges, and commissions, leaving a balance of $15,090.74 for distribution to creditors of said Association.

81 Schedule B thereof distributes this balance to about one thousand different creditors of said Association, including the four named in the sixth count of said indictment, in various sums varying from a minimum of 22 cents to a maximum of $618.99.

The said report was then offered in evidence by the prosecution who stated that it was offered for the purpose of showing the amount with which the Auditor charged the receivers on that date, which balance they subsequently charged themselves with in an additional supplemental account. The offer was made in these words: "We offer this paper, it being the report of the Auditor filed July 31, 1900." (by Mr. Easby-Smith, Assistant U. S. Attorney.) to which the defendant objected because it contains findings of facts by the Auditor, and the court withheld its ruling on the objection "for the time being."

The said witness then identified a paper shown him as another of said papers, purporting to be an Auditor's Report, filed December 7, 1903, by Schedule A of which the defendants in this case are charged with the said $15090.74 and in addition an interest debit of $1,532.26; and are credited with additional costs, charges, and commissions, amounting to $746.43; leaving a balance of $15,876.57 for distribution. Schedule B thereof distributes this whole balance to the four parties named in the sixth count of said indictment, in the following proportions and priorities: Henry Ann Stuart, $9,924.95; Howard L. Morrison, Administrator of Zephyrine A. Morrison, $3,150.65; May M. Cassin, Administratrix of William D. Cassin, $2,237.27; Virginia Trust Company, Administrator of Alfred Shields, the remainder of the fund, $563.70. The said report

82 was offered in evidence, the same, other than the said Schedules A and B thereof, being as follows in substance:

The Auditor restates "the account and distribution in accordance with the opinion of the Court of Appeals." He refers to and adopts Schedule A of his Report of July 31, 1900, as corrected by his Supplemental Report of September 24, 1900. He says: "The opinion of the Court of Appeals leaves that part of the said report confirmed by the decree of this court undisturbed, and without restating that schedule I refer to it as part of this report. For the statement of distribution I take the balance shown by Schedule A of the first said report as amended by the supplemental report. The Court of Appeals, in the conclusion of its opinion, used the following terms: 'In consequence of the failure of the Auditor to allow the claim of Mrs. Henry Ann Stuart a priority over those of the other certificate holders, and the approval of his report in this regard by the Supreme Court of the District of Columbia, we think there was error in the decree of that court in the premises for which it should be reversed.'" The Auditor then reports that the same principle which gives priority to the Stuart claim also applies to the Morrison, Cassin and Shields claims; and so distributes the whole balance to them, after crediting the receivers with their expenditures for storage, costs of appeal, auditor's fees, clerk's costs, and other items. The Auditor also quotes that part of the opinion of the Court of Appeals which holds that the other certificate holders of said Association are entitled beyond question to the remainder of the fund after payment of the Stuart claim.

83 The said witness then identified as of said papers certain other papers then shown him, purporting to be as follows: Decree, passed May 5, 1904, overruling exceptions to Auditor's Report of December 7, 1903, and ratifying the same; Decree passed March 23, 1903, on Mandate of Court of Appeals, D. C.; Mandate of Court of Appeals, D. C. of May 20, 1899; Mandate of Court of Appeals D. C. of March 3, 1903; and order passed June 7, 1901, overruling exceptions to Auditor's Report of July 31, 1900, and ratifying the said report, and supplemental account of the receivers dated November 23, 1903, bearing the genuine signature of the defendant.

The United States then offered as a witness in its behalf, Dr. YOUNG, Secretary of the Franklin Fire Insurance Company, who, having been duly sworn, identified two checks then shown him, drawn by the said Franklin Fire Insurance Company on June 28, 1895, to the order of the defendants herein as receivers on the National Bank of the Republic, one being for $21,228.15 for balance due for said realty and the other for $4.95 for balance due on adjustment of rentals thereof, both of said checks purporting to have been endorsed by the defendants and paid by the said Bank. The witness was then asked if he knew that there was a president of a company known as the Washington Beneficial Endowment Association, with its place of business at No. 419 Tenth st., N. W., to which he replied: "I know nothing of the organization as a corporation, but its place of business was No. 419 Tenth St., N. W."

The defendants' endorsements of said two checks were then proved, and said checks were offered in evidence without objection thereto. (D. T. W.)

84 Here the following occurred: Mr. EASBY-SMITH: I show you the two checks of the Franklin Fire Insurance Company and ask you to state whether or not they are the signatures of Andrew A. Lipscomb and Thomas M. Fields?

The WITNESS: I would state that those are their signatures, judging from the handwriting.

Mr. BAKER: I believe it was understood yesterday that all this evidence showing the receipt of money, or anything showing the receipt of money prior to the going into effect of the Code is subject to our exception.

The COURT: You reserved your exception?

Mr. BAKER: We except to counsel asking the witness, Mr. Parker, in regard to the checks of June 28, 1895, the two checks of that date, and also ask the court to strike out the testimony of Dr. Young in regard thereto.

The COURT: The checks are already admitted without objection.

Mr. BAKER: We object to the testimony of Dr. Young, on the ground that it shows, if anything, the receipt of money prior to the Code going into effect.

The COURT: That is the same point that was discussed yesterday. The motion is overruled.

Mr. BAKER: We note an exception. (11 A.)

The Government then offered evidence showing that with said checks the defendants opened an account as receivers in the West End National Bank of July 6, 1895.

The Government put in evidence the ledger entries of said West End National Bank account, showing that on March 17, 1897, the defendants had a balance there to their credit, which balance was paid out on three checks, payable to the Washington Loan

85 and Trust Company; which checks were put in evidence; that with these checks the defendants purchased two time certificates of deposit from said Trust Company, dated March 17, 1897; that thereafter, from time to time, they renewed said certificates, receiving in all fourteen certificates by way of renewal; that the first ten certificates were in their joint names as receivers, and the last six, beginning August 25, 1900, were in their joint personal names; that with proceeds drawn from one of said renewal certificates in their names as receivers, they opened an account No. 22,990 as receivers in said Trust Company on August 25, 1900, which account was paid out on eight checks for certain sums on certain dates, as shown by the ledger entries of said account; that on November 8, 1901, with proceeds drawn from one of said renewal certificates in their personal names they opened another account, No. 27,260, in their personal names in said Trust Company, which account was paid out on twenty four checks for certain sums on certain dates, as shown by the ledger entries of said account; that thereafter, with

a check on said account No. 27,260, bearing the genuine signatures of both defendants, another account No. 35,191 was opened in said Trust Company in the name of the defendant "for Lipscomb and Fields," which account was paid out on twenty-six checks for certain sums on certain dates, twenty of which postdated the indictment date, as shown by the ledger entries of said account and the checks against it, and five of which were apparently negotiated and cashed outside of the District of Columbia, as indicated by the endorsements thereon. Said ledger entries show the dates and amounts of deposits and payments, but not the dates of checks or the payees or
86 endorsers. Eight checks on said account No. 27,260, and the said twenty-six checks on said account No. 35,191, were then put in evidence by the Government.

The Government also produced the deposit slips relating to said accounts, and proved each of the same to be in the handwriting of some certain clerk in said Trust Company, and then offered the same in evidence; to which the defendant objected as not competent evidence against him, nor binding on him, without any evidence showing that he was a party thereto; but the court overruled the objection on the Government's offer to prove that the defendant had checked against such accounts; to which ruling the defendant duly reserved his Exception 12. The Government subsequently produced witnesses who testified that the entries in said accounts in the bank books of the said Trust Co. and the writing on the said deposit slips of said acounts were in their respective handwriting and true (D. T. W.); and the Government also subsequently proved that the defendant had checked against said accounts.

The Government also showed that on fifteen certain dates between March 17, 1897, and June 23, 1903, defendants drew fifteen certain sums for certain of said certificates. Fourteen of said certificates and seventeen of said checks, and twelve of said withdrawals, were prior to January 1, 1902. Certain of said withdrawals were deposited on the same dates to the credit of one or the other of said accounts Nos. 22,990 and 27,260; and the amounts of two certain other withdrawals, and of some of said checks, agree with the particular amounts of certain credits allowed the defendants by the Auditor in his said reports; but certain of said
87 withdrawals, and some of said checks, do not correspond with any credits allowed by the Auditor or claimed by the defendants, none of said check- against said account No. 22,990 was drawn to the order of the defendant, except one dated August 25, 1900, which was payable to him as Solicitor for Wm. T. Gilbert, Receiver, for $210.00, the proceeds of the sale of the personalty. Of the said checks against said account No. 27,260, one of April 15, 1903, for $248.43 was drawn to the order of the defendant as Solicitor for Wm. T. Gilbert, Receiver, for costs of appeal; and nine were payable to him directly, and endorsed by him and paid over the bank counter in cash without further endorsement. On one of said certificates of deposit, dated Nov. 8, 1901, and in the personal names

of the defendants, and matured Nov. 8, 1902, the defendant endorsed said Lipscomb's name on Nov. 11, 1902, in the defendant's usual handwriting, and without any attempt at simulation; and on the following day said Lipscomb personally endorsed the said certificate. Subsequently said Lipscomb expressly verified to Parker, Treasurer of said Trust Company, that the defendant Fields had authority to sign his, Lipscomb's, name to checks relating to their accounts in said Trust Company, and specially ratified all checks to which said Fields had signed his, said Lipscomb's name, being four in all and *a* amounting in all to $1850.00. On each of said four checks the defendant, after having signed said Lipscomb's name thereto in the defendant's usual handwriting and without any simulation, wrote immediately after said Lipscomb's name, in the same handwriting, the letter "F," being the initial letter of the defendant's surname. On November 12, 1902, the defendant, referring
88 to his endorsement of said Lipscomb's name on said certificate of November 8, 1901, stated to one Eckloff, cashier of the Second National Bank, in the presence and hearing of said Lipscomb: "I had the power to do it; it is all right;" to which statement said Lipscomb made no reply. The last three checks on said account No. 27,260, and all of those on said account No. 35,191, were left in said Trust Company, but the defendant could have had the books balanced and the checks delivered to him at any time he wished prior to this prosecution. The said accounts were carried on openly and without any concealment. To all and each of said deposit slips, certificates of deposit, withdrawals, and checks, not in the names of the defendant as receivers, the defendant objected for that reason; and to them and each of them, he also objected as relating to property which came into possession before the Code was passed; but the court overruled the objection and admitted the same in evidence; to which ruling the defendant duly noted his Exception 13. The Government offered no evidence tending to show any conversion at one time and in one lump sum of the $15,974.07 mentioned in the indictment, nor of any conversion on November 23, 1903, the date of the offense alleged therein. One of said checks, against said account No. 27,260, was for $1300, and dated September 8, 1903, from which the signatures had been cut off; and another of said checks was for $1200 and dated June 20, 1903, from which the signature other than the defendant's had been cut out. All checks on said account No. 27,260 after August 8, 1903, bore the genuine signatures of both defendants. Said Parker testified that said Trust
Company delivered said last mentioned two checks together
89 with prior checks against said account, to either Mr. Lipscomb or Mr. Fields, in unmutilated condition. The U. S. Attorney here stated, in answer to a question by defendant's counsel, that all of the checks which he has put in evidence other than the said last three on said account No. 27,260, and the said twenty-six on said account No. 35,191, were received by him from said Lipscomb, and that they were then in the same condition in which they were when

offered in evidence in this case. The court ruled out all the endorsements on all of said checks on said account No. 35,191, other than the defendant's, because no evidence was offered to prove the same. One of said checks against said account No. 35,191 for $500 also bears the genuine signature of the defendant Lipscomb. Said Eckloff, in answer to a question by the U. S. Attorney as to whether he knew anything about the Washington Beneficial Endowment Association, testified that he knew that there was such an Association in existence here at one time; that he does not know that it existed in November, 1902; that it did business at one time; that he knew Mr. Gardner, its President; that he never had a policy, but paid other policies and paid Mr. Gardner; that it first did business on F. street; and he believes then it moved to No. 419 Tenth street, N. W.; that he paid other people's premiums for them; that it was in 1879 or 1880 when he was there and knew it was doing business, and when he met Mr. Gardner whom he has not met since; that he does not know when it ceased business, but understood that it had ceased; and that he does not know Mr. Gardner is dead.

The said Parker and Eckloff were called by the Government as its witnesses, and were duly sworn and testified as such.

90 The aforesaid ledger entries were made by various bank employees from the original deposit slips and checks in the usual course of the bank's business.

As to the last twenty of the said twenty-six checks against said account No. 35,191 the following occurred:

Mr. EASBY-SMITH: We now offer all these checks in evidence.

Mr. BAKER: We object to those checks on the ground that they are all dated after the day alleged in the indictment; that all except one appear to be the checks of Thomas M. Fields for Lipscomb and Fields; and there is no evidence to show that the money represented by these checks came into the possession of the defendant other than before the Code went into effect. And, on the further ground, we object that the indictment alleges the embezzlement of a certain sum of money on a certain day; and if the Government expects to use these checks, and show embezzlement on different days, we object to them on that ground because the indicement alleges but one offense, and the Government should not be permitted to prove any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day.

The COURT: The objection is overruled.

Mr. BAKER: We note an exception. (14.)

The Government then presented as a witness in its behalf, Walter A. Pinchback, who, having been first duly sworn, testified that he is employed in the office of the Recorder of Deeds. The witness then produced and identified a book from said office, called Acts of Incorporation No. 2. Folio 165 of said book purported to be a record of a certificate of incorporation of the Washington Beneficial Endowment

Association; and the same was then offered in evidence; to
91 which the defendant objected because no law required such certificate to be recorded in said office, nor made such record primary evidence of the existence, contents, or execution of the original. The court sustained the objection on the ground that it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence.

The Government then offered a certified copy of the aforesaid record of the certificate of incorporation of the said Association, to which the defendant objected, because no law authorized or required such certificate to be recorded in the office of the Recorder of Deeds; and the objection was sustained.

The said PINCHBACK then testified, upon recall, that said copy was made from said record; that he had searched for the original certificate in the files where it ought to be kept and could not find it; that a series of books was in the office of the Recorder of Deeds, called Acts of Incorporation; that he does not know what period they cover; and that he has been in said office since November, 1891, off and on. The court then sustained the objection to said copy, and the U. S. Attorney said: "We will withdraw that feature of the case for the present."

The Government then again recalled said Pinchback, who produced and identified book No. 1, called Acts of Incorporation, from the office of the Recorder of Deeds, and testified that it starts May 23, 1870; and the said book was then offered in evidence; to which the defendant objected because the book itself is not competent, as far as the issue involved is concerned, and as to the existence of this
92 corporation, which by law is required to be kept; but the court overruled the objection, and admitted the said book in evidence; to which ruling the defendant duly reserved his Exception 15.

The Government then called as its witness Col. SCHAYER, who, having been duly sworn, said that he was in the Recorder of Deeds' Office for thirty odd years all told; that he was first there from April, 1869, to the fall of 1886; and then from 1890 to 1903; that in said office was kept a series of libers called Acts of Incorporation; that they were kept under the general Incorporation Act of Congress; that the custom was to record all certificates whether required by law to be recorded or not, and then to return them to the persons who brought there the record receipt; that a ruling of the office required them to be copied; that he knows the handwriting of the copyist who made the said liber copy of the certificate of the said Association; that the said copyist is dead; and that it was the duty of the assistant clerk to make this copy in the said liber and compare it with the original. The U. S. Attorney then stated that the original certificate of incorporation of said Association was lost; that diligent search had been made for it, and that it could not be found; and he then offered the said liber copy as secondary evidence of the original; to which testimony of Col. Schayer the defendant objected as incompetent and immaterial, and to which copy he objected be-

cause no proper foundation for secondary evidence had been laid; and because the loss of the original certificate had not been proved; and the defendant also objected to the acknowledgment of said copy because the execution of the original had not been proved; and because said copy does not prove the execution of the original; but the court overruled the objection, and admitted the said testi-

93 *court overruled the objection, and admitted the said testi*mony and copy in evidence; to which ruling the defendant duly reserved his Exception 16. The U. S. Attorney said: "Remember, we are not offering the record as a record that is required to be kept by law." This statement was made just before the court overruled the defendant's said objection. The said copy is as follows:

This is to certify that under the provisions of an act of Congress entitled "An Act to provide for the creation of corporations in the District of Columbia by general law," the undersigned hereby agree to become a body corporate, under the name of the Washington Beneficial Endowment Association, for the purpose of providing an endowment fund to be paid to the persons entitled thereto *who* upon the death of the party named in the certificate of endowment.

The existence of said corporation to be perpetual and the capital stock ten thousand dollars, divided into two hundred shares of fifty dollars each.

The concerns of the corporation for the first year to be managed by the following named trustees, viz: Robert B. Donaldson, Noble D. Larner, William H. Goods, Robert Ball, Alexander Gardner, George B. Clarke, Thomas J. Luttrell, Charles E. Prentiss, and Isaac L. Johnson.

The office of the corporation to be kept in the city of Washington, District of Columbia.

In witness whereof we have hereunto set our hands and seals this second day of April, A. D. 1877.

R. B. DONALDSON.	[SEAL.]
NOBLE D. LARNER.	[SEAL.]
W. H. GOODS.	[SEAL.]
ROBERT BALL.	[SEAL.]
ALEX. GARDNER.	[SEAL.]
GEO. B. CLARK.	[SEAL.]
THOS. J. LUTTRELL.	[SEAL.]
C. E. PRENTISS.	[SEAL.]
I. L. JOHNSON.	[SEAL.]

Witness:
S. C. MILLS.

94 DISTRICT OF COLUMBIA, *County of Washington, ss:*

I, Sam'l C. Mills, a notary public in and for the county and District aforesaid, do hereby certify that Robert B. Donaldson, Noble D. Larner, William H. Goods, Robert Ball, Alexander Gardner, George B. Clarke, Thomas J. Luttrell, Charles E. Prentiss, and Isaac

L. Johnson, parties to a certain instrument in writing bearing date on the second day of April, A. D. 1877, and hereto annexed, personally appeared before me in the county aforesaid, and, they being personally well known to me to be the persons who executed the said instrument of writing *and* acknowledged the same to be their act and deed.

Given under my hand and seal this second day of April, A. D. 1877.

SAM'L C. MILLS.
[NOTARIAL SEAL.] *Notary Public.*

The United States then called as its witness Dr. R. B. DONALDSON, who, having been duly sworn testified that he is the same R. B. Donaldson who was one of the incorporators of the Washington Beneficial Endowment Association; and then he was asked by the Government when the said Association was incorporated; to which the defendant objected, but the court overruled the objection; to which ruling the defendant duly noted his Exception 17. The witness then answered that he believed said Association was incorporated in 1873; and that he was one of the incorporators and was president for it for about twelve years; that there was a secretary and a treasurer; that it first met in Alexander Gardner's studio, and
95 then on Tenth street where the building was that the company occupied until its dissolution, the same building he thinks, now occupied by the Franklin Fire Insurance Co., that by dissolution he means when the company closed up and went out of business, that it carried on life insurance business; that he ceased to be president about three or four years before its dissolution; that the company was closed up and went out of business about 1893; and that the company has not carried on any business since 1893 to his knowledge. The witness also testified that he was not a stockholder in the company in 1893 or 1894.

The Government then offered in evidence a certified copy of a deed in fee simple from Bacon and Larner, Trustees to the Washington Beneficial Endowment Association, dated September 16, 1889, and recorded the same date in Liber 1421, Folio 278 *et seq.*, one of the Land Records of the District of Columbia, purporting to convey the north one-half of original lot 11, in square 378, to said Association; to which deed the defendant objected, on the ground that the deed itself does not necessarily show that any title passed by it; but the court overruled the objection, and admitted the said copy in evidence; to which ruling the defendant duly noted his Exception 18.

The Government then offered in evidence a certified copy of a deed in fee simple from the said Washington Beneficial Endowment Association to the "Commercial Alliance Life Insurance Company of the State of New York, a body corporate," dated August 9, 1894, and recorded August 10, 1894, in Liber 1937, Folio 141, *et seq.*,

one of said Land Records, conveying to the said Company the said north one-half of original lot 11 in square 378; to which deed the defendant objected; but the court overruled the objection,
96 and admitted the said deed in evidence; to which ruling the defendant duly noted his exception 19. With this document and as a part of it there is a certificate by the secretary that at a special meeting of the stockholders after due notice at the office of the association August 9th, 1894 a resolution was adopted directing the president to convey in fee-simple the title to the said real estate to the Commercial Alliance Insurance Company for such consideration as he might deem advisable.

The Government then re-offered as a link in the chain of title to real estate and as the foundation of a claim to personal property, the said decree of June 27, 1896, as to clauses 1 and 2 thereof; to which the defendant objected for the same reasons stated in his former objection to said decree. The court again sustained the objection as to the second clause thereof, and admitted the said first clause in evidence, to which latter ruling the defendant duly reserved his Exception 20.

The United States then re-offered the said Auditor's Report of July 31, 1900, and withdrew said offer and then offered schedule "A" of said report; to which the defendant objected; the Court overruled said objection, to which ruling the defendant then and there excepted; and only said schedule "A" of said report was received in evidence. (21) D. T. W.

Schedule A of this Report charges the defendants with a balance of $15,090.74.

The Government then offered a Supplemental Report of the Auditor, filed August 30, 1900; to which the defendant objected for the reasons stated in his last Exception; but the court overruled the objection, and admitted the said report in evidence, to which
97 ruling the defendant duly reserved his Exception 22.

The Supplemental Report merely corrects an error of $50.00 in the credits of the said report of July 31, 1900, and increases the said charge of $15,090.74 to the extent of $50.00.

The Government then offered in evidence the Auditor's Report, filed December 7, 1903; to which the defendant objected for the reasons stated in Exception 21; and because the said Report postdated the time of the offense alleged in the indictment; but the court overruled the objection and admitted the said Report in evidence; to which ruling the defendant duly reserved his Exception 23. (D. T. W.)

The offer was made as follows:

Mr. EASBY-SMITH: I now offer the final report of the Auditor filed December 7, 1903. It is undated.

Mr. BAKER: Do you claim the receivers made a report after this?

Mr. E-S: I do.

Mr. B.: Where is that report: Let me see it.

Mr. E-S: I have not offered it yet.

Mr. B: I should like to look at it. We object to this because it would appear that the report of the receivers to which Mr. Easby-Smith refers was made before this report of the Auditor—Nov. 23, 1903, and on the back of it is Filed Nov. 23, 1903."

Mr. E-S: That is not a court filing.

Mr. B: No, not a court filing; but it was identified.

Mr. E-S: Merely as to the signatures.

Mr. B. And this report of the Auditor was filed Dec. 7, 1903, and after the date laid in the indictment.

98 The COURT (after argument): The date does not cut any figure. The fact that the date is in that paper does not prove it was filed that day or made that day.

Mr. E-S: I offer this both as to the schedule of Lipscomb and Fields and as to the schedule of distribution, promising to follow it up with the decree of the court ratifying and confirming the distribution.

Mr. BAKER: We object to it.

The COURT: This is the same paper, Mr. Baker—the Auditor's report?

Mr. B.: This is the Auditor's report.

The COURT: The objection to that is overruled.

Mr. B: I was going to call your Honor's attention to the fact that in the other reports they were only offering in evidence the schedules showing the account of the receivers on the ground that in this report of the receivers they acknowledged and admitted the report of the auditor. Now they go further in this case and want to offer in evidence the schedule of distribution, which is certainly a finding of fact by the auditor, and which was excluded a few minutes ago, in excluding a certain portion of the decree which your Honor excluded.

The COURT: You expect to show there was something in that order of distribution?

Mr. E-S: Yes; I expect to offer that and this decree. Then I expect to re-offer section 2 of the decree of June, 1896, thinking I had then complied with the requirement as set out by your Honor as to that part of that decree.

99 The COURT: Do you expect to show that this order was never complied with?

Mr. E-S: Yes. You mean this final order, your Honor?

The COURT: The order of distribution.

Mr. E-S: Yes.

Mr. B: Is it offered for the purpose of showing title in these people?

Mr. BEACH: For all purposes.

Mr. BAKER: They are trying to get in exactly what your Honor has ruled out, the part of the decree that attempted to say who owned the personal property. They now want to get in this schedule of distribution, claiming by that they can show title to the personal property.

The COURT: Why is it not evidence tending to show conversion?

Mr. BAKER: It is not evidence tending to show a conversion because it is a report of a finding of fact on the part of the auditor of so much money in their hands. It is a further report of the auditor finding as to who is entitled to this money; it is a report that was filed after the date alleged in the indictment, and certainly can cast no reflection or light on the issue involved, and that is whether or not this defendant did on the day alleged in the indictment, or some day, embezzle money in his hands belonging to somebody. But my particular objection to the paper is the objection which was sustained by your Honor a few minutes ago. The only object of the Government in getting this paper in evidence is for the purpose of trying to show title in somebody, and we contend it cannot be used for that purpose.

100 The COURT: That may be; but if it is relevant for another purpose it must be received. It seems to me it is relevant in connection with an order of distribution and proof that the order was not complied with, exercising probative tendency on the question of conversion. The objection is overruled.

Mr. BAKER: We note an exception.

Mr. Easby-Smith thereupon read in evidence to the jury the paper above referred to, "as to both schedules thereof."

101 The United States then offered in evidence a decree and order of distribution of May 5, 1904, ratifying the said Auditor's Report of December 7, 1903; to which the defendant objected for the reasons stated in his Exception 23; but the court overruled the objection, and admitted the said decree in evidence; to which ruling the defendant duly reserved his Exception 24.

The said decree is as follows:

Filed May 5, 1904; J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 15907, Equity Docket 37.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION
vs.
THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

No. 15809, Equity Docket 37.

ROBERT BALL ET AL.
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

No. 16072, Equity Docket 38.

JAMES S. EDWARDS, Surv. Admr.,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

No. 16165, Equity Docket 38.

MAN S. QUARLES, Adm'r.,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

The above entitled consolidated causes, numbered respectively 15,907, 15,809, 16,072 and 16,165, in Equity, in this Court, having come on for hearing upon the exceptions of the respondent, William T. Gilbert, Receiver of the Commercial Alliance Life Insur-
102 ance Company, filed January 6, A. D. 1904, in said cause No. 15,907, and upon the bills of complaint, petitions of intervenors, answers, replications, papers, proceedings and evidence in each and all of said causes, and having been considered by the Court, it is, this 5th day of May, A. D. 1904, by the Court adjudged, ordered and decreed that said exceptions be, and the same are hereby overruled, and that the Auditor's Report, Account and Distribution filed December 7, A. D. 1903, in said cause No. 15,907, be and the same are, hereby finally ratified and confirmed, and that Andrew A. Lipscomb and Thomas M. Fields, Receivers, be, and they are, hereby directed forthwith to make distribution in accordance therewith.

ASHLEY M. GOULD, *Justice.*

The Government then called as its witness W. T. TYSER, who having been duly sworn, testified that he is a member of the Metropolitan Police Force, and one of the detectives at headquarters; that he knows the defendant; that he began to look for the defendant early in June, 1904, but could not find him; that he went to New York City three times and had circulars sent broadcast through the United States with a photograph of defendant, offering a reward for his arrest; that he finally found the defendant at Rayville, N. Y., on March 9, 1905, at the house of one Carpenter, and arrested him there, and brought him to Washington; that he heard said Carpenter call the defendant by the name of Dr. Brown, to which name the defendant responded; that the defendant consented to return to Washington, on the paper which the witness then had with him; and that
103 the witness made every possible effort to find the defendant here in June, 1904, by inquiries of the defendant's friends, and at places he had visited.

The Government then re-called SAMUEL MCCOMAS HAWKEN, who was then shown a paper purporting to be a bill in Equity Cause No. 16165, which he identified as from the files of said cause. Another paper was then shown him, purporting to be a stipulation for con-

solidation, which he also identified as from the files of the same cause. Another paper was then shown him, purporting to be a bill in Equity Cause No. 16072, which he identified as from the files of said cause. Another paper was then shown him, purporting to be an order consolidating said Equity Cause No. 16072 with Equity Cause No. 15907, which he also identified as from the files of said former cause. Another paper was then shown him, purporting to be a demurrer of Lipscomb and Fields, which he also identified as from the files of said Equity Cause No. 16,165. Another paper was then shown him, purporting to be an answer of Lipscomb and Fields to the bill in said Equity Cause No. 16072, which he identified as from the files in said cause. The witness then identified the defendant's signature to said answer. The Government then offered in evidence the bill in Eq. No. 16072; the defendant being a party thereto; to which the defendant objected because the same is irrelevant to the issues in this case; and because the defendant is not charged as a receiver in said cause; but the court overruled the objection and admitted the said bill in evidence; to which ruling the defendant duly reserved his

D.T.W.

Exception 25. Counsel for Defendant then withdrew his objection to paragraphs 18 and 19 of said Bill, and consented that so much of said Bill be received in evidence; The Government then

104 offered the order consolidating Eq. No. 16072 with Eq. No. 15907; to which the defendant objected for the reasons stated in Exception 25, but the Court overruled the objection, and admitted the said order in evidence; to which ruling the defendant duly reserved his Exception 26. The said order is as follows:

"On motion of the complainant, by his solicitors, it is this 28th day of December, A. D., 1894, ordered that this cause be, and the same is hereby, consolidated with the suit of the defendant the Washington Beneficial Endowment Association against the defendant The Commercial Alliance Life Insurance Company of New York, Number 15907 equity, now pending in this court.

W. S. COX, *J.*"

The Government then offered in evidence the said answer of the defendants, Lipscomb and Fields, as to paragraphs 18 and 19 of the

D.T.W.

bill No. 16072. Counsel for defendant withdrew his objection to so much of the answer as answered paragraphs 18 and 19 of the Bill and consented that the same be received in evidence; and the Government then again offered the whole bill No. 16072; to which the defendant again repeated his objection in Exception 25. The court then sustained the objection to all of said bill except "the endorsements, with the file marks on the bill, the caption showing the interested parties, the opinion if there is one, and paragraphs 18 and 19;" and overruled the objection as to the said excepted matters and admitted the same in evidence; to which latter ruling the defendant

duly reserved his Exception 27. The said caption and paragraphs 18 and 19 of said bill were then read to the jury as follows:

105 *Original Bill, &c.*

Filed, December 11, 1894.

In the Supreme Court of the District of Columbia.

No. 16072. In Equity.

JAMES S. EDWARDS, Surviving Administrator, with Will Annexed, of Anthony Buehly, Deceased, Complainant,

vs.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION, THE Commercial Alliance Life Insurance Company, and Andrew A. Lipscomb, and Thomas M. Fields, Receivers, Defendants.

To the Supreme Court of the District of Columbia, sitting in equity:

The complainant states as follows:

* * * * * * *

XVIII.

By an order of this court passed in said suit of the defendant endowment association against the said Alliance Insurance Company, No. 15,907, in Equity, on the 6th day of November last, the defendants Lipscomb and Fields were appointed receivers to take charge, custody, control, and possession of all of the property— real, personal and mixed—including all books, documents, papers, vouchers, bills and correspondence of any and every description, so as aforesaid assigned, transferred, and conveyed to the said Alliance Insurance Company, and to hold the same subject to the further order of the court. A copy of this order is herewith filed as a part of this bill, marked "Complainant's Exhibit No. 8." Under the authority and provisions of this order said receivers have qualified and have taken possession of the property and things committed to their custody and care as aforesaid, and now hold the same under the pro-

106 visions of said order. Your complainant is informed and believes and therefore further states that the books, records, and papers now in such custody and control, should and will show the amount of money collected by the said endowment association by reason of the assessments made on the surviving members thereof or certificate-holders as aforesaid, and also the condition and character of the property and funds so as aforesaid held by said endowment association when said Nalley died, and what portion thereof, particularly and in detail, through the said attempted sale and transfer was actually paid, turned over, and delivered by it to said Alli-

ance Insurance Company, the unpaid death losses, the dates of the death of the several certificate-holders, the amount payable to the several beneficiaries named in each certificate, and the names of such beneficiaries now claiming to be paid from such property, funds, or moneys, and all of which your complainant is further advised and avers is necessary for him to know to enable him to prosecute this suit and to protect the interests of the estate he represents as aforesaid in the premises, and your complainant claims that he is entitled to a discovery from such of the defendants as may have any knowledge or information thereof as to all of such matters and things.

XIX.

By a further order passed in said equity cause No. 15907 the said receivers were directed to proceed to sell all of the real estate and personal property in their possession, except the books, papers, and documents aforesaid, and the said real estate is now under advertisement for sale under such authority. A copy of this order, as a part of this bill, is also filed herewith, marked "Complainant's Exhibit No. 9."

107 Your complainant is further advised, avers and claims that any sale or disposition of said real estate and premises and property will be subject to the lien and rights of your complainant as aforesaid, not being a party to the proceedings under which said orders were passed and having no connection therewith, and also subject to the final decree in and disposition of this cause.

* * * * * * *

Paragraphs 18 and 19 of the said answer were then read to the jury as follows:

* * * * * * *

18.

In answer to the allegations of the eighteenth paragraph of the said bill, these defendants say that they admit their appointment as receivers as therein set forth, and that they have heretofore taken possession of the property mentioned in the order appointing them. They have no personal knowledge as to the remaining allegations of the said paragraph, and therefore neither admit nor deny the same.

19.

In answer to the allegations of the nineteenth paragraph of the said bill, these defendants say that they have heretofore sold the real estate and personal property in their possession, but still have the books and documents in the said bill mentioned. Answering the allegations of the latter part of the said paragraph, these defendants say that the complainant is bound by the sale of the said real and personal property for that this cause has been consolidated with the cause in which

the orders appointing these defendants as receivers and directing them to sell the said real and personal property were passed, and for that the said sales by them were reported to and ratified by
108 the court in this cause in addition to the cause in which they were appointed.

* * * * * * *

The witness then identified a mandate of the Court of Appeals of the District of Columbia, dated May 20, 1899, affirming the said decree of June 27, 1896, and remanding the cause "for the purpose of the audit directed by that decree, and for such further proceedings as may be proper in the premises." This mandate was not offered in evidence, but during the argument of defendant's counsel to the jury it was agreed, with the approval of the court, between counsel for the respective parties, that the said mandate should be considered in evidence; and the defendant's counsel read to the jury, during his argument, portions of the opinion of Mr. Justice Cox on which said decree of June 27, 1896, was based; which latter opinion was adopted by the Court of Appeals as part of its said opinion; said opinions being reported in full in 10 App. D. C. 316. The said opinion of Mr. Justice Cox is to the effect that the Washington Beneficial Endowment Association was dissolved on August 9, 1894, by its said sale and transfer on that date to the Commercial Alliance Life Insurance Company; and by the facts that the said company bought the property and not the stock of the said Association, and that with the $14000.00 purchase money received for its property the said Association then redeemed and extinguished all of its outstanding stock; that its said deed of that date to the said Company was in equity constructively fraudulent as against creditors of said Association, and for that reason should be set aside as against them; that the said creditors do not proceed on the ground that the deed was void as fraudulent under the statute of 13 Eliz., and there is no averment that
109 there was express fraud under the statute of Elizabeth to cheat and defraud creditors; that "there is no such averment in any one of those bills which are consolidated, but they all proceed on the ground of trust. * * * My conclusion is that the deed from the Beneficial Endowment Association to the Commercial Alliance Life Insurance Company must be set aside, and the proceeds applied to the satisfaction of the debts as far as they can go;" and that the said proceeds of the said real estate belong exclusively to such creditors. The following parts of said opinion were read to the jury in argument of defendant's counsel:

"We know that the old rule of the common law was that the corporation expired upon the death of all its members; and so also if the members ceased to be members, the corporation must cease, too. There cannot be a stock corporation without stockholders. This was a stock association, and the trustees had to be elected from the stockholders and the president elected from the trustees, so that the result of this transaction was that there were no stockholders, trustees or president. If it was sought to enforce these contracts,

who could bring the suit? Certainly, nobody. The corporation had dissolved itself. It had vanished into thin air. The promises of the Commercial Alliance were made to a mere phantom and could not be enforced. * * * I have not found it necessary to pass upon the matters in controversy between the two associations, because, without reference to them, the creditors are entitled to the whole fund as against both Companies."

The said opinion of the Court of Appeals affirms the said Decree of June 27, 1896, and opinion of Mr. Justice Cox; and holds also that

110 the said suit of the said Association against the said Company virtually became a suit by creditors and certificate holders to reach the assets of an insolvent corporation for the satisfaction of their claims; that "as such it would seem to have been treated by all the parties; and as such certainly it was regarded by the Court below at the hearing;" that "the substantial question in this case is—to whom does the fund in court equitably and justly belong;" that if the transaction between the said Association and Company was as claimed by the President of said Association, "a court of equity could not lend itself to a performance so absurd as would be the restoration of property from the grasp of the Commercial Alliance Company, as a company, to the possession of the same Commercial Alliance Company as the sole stockholder, and, therefore, entire owner and proprietor of the Endowment Association and of all its property and franchises;" that "it is clear that the Commercial Alliance Company has no just right to set off that sum of $14000 against the claims of creditors of the Association;" and that if their claims should not exhaust the funds in the hands of the receivers, "in that event, of course, any residue undisposed of would go to the Commercial Alliance Company."

The Government then called as its witness CONWAY ROBINSON, who, having been duly sworn, testified that he is a lawyer and attorney for Morrision named in said Auditor's Report of Dec. 7, 1903, as a distributee; and that as far as his knowledge goes there has been no distribution to his client.

The United States then called JAMES E. PADGETT as its witness, who said he is a lawyer, and represented Henry Anne Stuart, one of said distributees; and that so far as he knows there has been no distribution to her.

111 All of the orders and decrees passed in said Equity Cause No. 15,907, and consolidated causes, were recorded finally and at length in the minutes of the Court the same day they were passed.

In a certain letter in evidence written by the defendant in 1904, he referred to the same moneys mentioned in the indictment as the "W. B. E. A. money."

At this point the U. S. Attorney, Mr. Beach said: "The Government rests, if it please the Court."

Thereupon the defendant moved the court to strike out all the evidence offered by the Government tending to prove by secondary evidence the existence of a charter of the Washington Beneficial Endowment Association, because there is no evidence to show that there ever was an original charter in existence, or that it was ever properly or duly executed; and because no sufficient foundation has been laid to prove the said document by secondary evidence; but the court overruled the motion; to which ruling the defendant duly reserved his Exception 28.

The defendant then called JOHN JOY EDSON as his witness, who, having been duly sworn, testified that he is President of the Washington Loan and Trust Company; that he was connected with the Washington Beneficial Endowment Association as a stockholder and policy-holder at the time it failed, which was in 1894; that said Association was then doing business on Tenth street near the gas office; that it ceased to do business in 1894; that all of the stock of said Association including his was sold by it to the Commercial Alliance; that since 1894 the said Association has not carried on any business in the District of Columbia, or elsewhere that he knew of; that the Tenth street building is No. 419, where the Franklin Fire
112 Insurance Company now is—the same building that was purchased by said Company; that in speaking of the transfer of stock he means his own stock; and that he does not know about anybody else's stock, only from hearsay.

The defendant then called DAVID H. MEAD, as his witness, who, having been duly sworn, testified that he is a patent Attorney residing in Washington; that he knows the defendants Lipscomb and Fields; that on one occasion the witness saw Mr. Fields get some money from the Washington Loan and Trust Company; that this was on September 8, 1903; that the witness did not see Mr. Fields draw the money from the bank, but saw the money after he got it from the bank; that the bank Mr. Fields went to was the Washington Loan and Trust Company; that Mr. Fields went there in the morning about 10 or 11 o'clock; that the witness saw Mr. Fields take a check in when he went into the bank; that the witness waited outside, and walked with him back to his office; that just before Mr. Fields came to his office he took out a thousand dollar bill, and put it into an envelope and called the witness' attention to it, saying, "there is a transaction here that I may want to recall to your mind some time;" that Mr. Lipscomb was in Mr. Fields' office waiting for him; that Mr. Fields showed the witness this envelope before he went in; that Mr. Fields walked in and handed it with the thousand dollar bill to Mr. Lipscomb; that the witness did not hear anything said particularly at that time between them; that he did not pay any attention to that; that the only thing which made an impression on him was Mr. Fields calling his attention to the thousand dollar bill, and saying that he might refresh his memory about it later, or some-

113 thing of that kind; that Mr. Lipscomb after the envelope was handed to him, took it and walked into a back room by himself; that the witness knows that the thousand dollar bill was in that envelope; that he saw it put there, and saw it handed to Mr. Lipscomb; that after the bill was put in there the envelope was not out of the witness' sight up to the time Mr. Lipscomb got it; that after he saw the envelope handed over to Mr. Lipscomb, he, the witness, was there for ten or fifteen minutes; that Mr. Lipscomb went away before the witness did; that the witness waited until after Mr. Lipscomb left; that the witness was in the room with Mr. Fields; that Mr. Lipscomb went out to the back room, or the hallway, or somewhere, by himself, and then he came *came* back through the room where Mr Fields and the witness went, and Mr. Lipscomb went away before the witness did.

On cross-examination the witness said that this was September 8, 1903, during the morning or during the banking hours at least; that the witness first saw Mr. Fields at his, Mr. Fields' office, that the witness had gone to Mr. Fields' office that morning; that the witness saw Mr. Fields have the check before he went into the bank; that Mr. Fields and the witness left Mr. Fields' office together, and Mr. Fields had the check; that the witness first saw the check just before Mr. Fields went into the bank; that Mr. Fields said: "I am going in here to get some money;" that Mr. Fields had asked the witness to walk up to the bank, saying that he was going there to get some money; that was the first time the witness saw the check, but he did not read it; that Mr. Fields had the check, and went into the bank, and then came out again; that the witness saw the money in Mr. Fields' hand shortly after he came out of the bank; that Mr. Fields and the witness then walked back together to

114 Mr. Fields' office; that Mr. Fields took the thousand dollar bill and put it in an envelope and handed it to Mr. Lipscomb, who was there when they returned; that Mr. Lipscomb then went into the back office; that the witness got no part of that check himself, and had no interest in the transaction; that Mr. Fields simply called the witness' attention to the fact that he was giving Mr. Lipscomb a thousand dollar bill, and asked the witness to specially note it; that this is the reason the witness remembered the date.

As to the foregoing testimony of Mr. Mead, the following then occurred:

Mr. BEACH: I move to strike it out. The Court: The motion is granted. Mr. Baker: We note an exception (29). The Court: This motion is granted on the ground that there is no evidence tending to show that the money was of the fund in question. Mr. Baker: We had a check of that date for $1300 already in evidence. Mr. Easby-Smith: Where is that check? Mr. Baker: There it is. I will show the check to your Honor with the signatures cut off. The Court: It is quite clear to me that if you charge a receiver with embezzling one thousand dollars, it means that he wrongfully con-

verts it to his own use. If he shows that he did not wrongfully convert that thousand dollars to his own use, but gave it to his co-receiver, who, under the law, was entitled to have possession of it, that is an absolute defense to that item. Mr. Beach: Your Honor holds that it stays in on the ground that it is simply a transaction of the custody of the thousand dollars from one receiver to the other. The Court: Yes. Mr. Beach: On that ground I have no objection in the world to it going in. The Court: Note, Mr.
115 Stenographer, that in view of the check of September 8, the testimony, of Mr. Mead stands.

The defendant then called HOWARD C. WALL as his witness, who, having been duly sworn, testified that he knows the defendants Lipscomb and Fields; that he recalls being present at a money transaction between Mr. Lipscomb and Mr. Fields about two or three years ago, but does not know the exact date; that he saw a check, but did not notice it particularly; that he came into Mr. Coldenstroth's one night about 9 o'clock, and Mr. Fields asked him to cash a check; that Mr. Fields said that Mr. Lipscomb had a check for $500 that he wanted cashed; that the witness replied that he did not have that much money with him; that this was in front of Mr. Lipscomb; that by and by Mr. Fields took the witness over to the side, and said that there was a check there that Mr. Lipscomb had that he was interested in; that Mr. Fields then gave the witness five one hundred dollar bills to cash the check; that Mr. Lipscomb got this money for the check; that the witness kept the check and afterwards gave it to Mr. Fields.

On cross-examination the witness testified that this was in Mr. Coldenstroth's on Ninth Street right above the Academy and D Street, and about 9 o'clock in the evening; that the witness got five one hundred dollar bills from Mr. Fields to cash the check Mr. Lipscomb had; that the check was for $500; that the witness gave the five one hundred dollar bills to Mr. Lipscomb for the check which Mr. Lipscomb gave him first; and that he afterwards gave Mr. Fields this check which Mr. Lipscomb gave the witness.

The foregoing is the substance of all of the evidence offered by the defendant, who thereupon rested. The Government then announced that it had no further evidence to offer.

116 The defendant then moved the Court to withdraw a juror and discharge the jury from further consideration of the case because the Government had not crossed the defendant's interrogatories in New York and London witnesses, which he had filed on May 6, 1905, and because, in view of this fact. the defendant was unable to proceed further with his case. The following then occurred: The Court: Have you issued a summons or subpœna for the witnesses in New York? Mr. Baker: No. The Court: You are aware of the order the court made a week ago to that effect, are you not? Mr.

Baker: No. I am aware of the fact that your Honor said we could have process if we wanted to have them brought here. I am aware of that fact, but there was no order made of record. I examined the record, and found no such order. The Court: The order was directed to be made, and I suppose it is on the record, that process should issue requiring the attendance of those witnesses in New York whenever process was requested by counsel for the defendant. Counsel have understood for a week the request would be granted. Mr. Baker: I understood the attitude of the Court. Our objection is that our witnesses could not get the written documents that it was necessary for them to get in order for them to appear here under subpœna. The Court: I merely ask to ascertain if counsel understands that process could be had. Mr. Baker: Yes, sir. I understand. The Court: The motion is overruled. To which ruling the defendant reserved his Exception 30.

Thereupon the Government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the Court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the
117 court would see from the drafts of the prayers handed up.

The Court then took a recess. After recess the following occurred: The Court: Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The Court has examined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. Mr. Baker: We note an exception to the refusal of each prayer. We note an exception separately to the refusal of each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer. The Court: I overrule them. They are put together as a series, and as a series are refused. Mr. Baker: Then I offer prayer No. 1. But I suppose the Government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.

Thereupon the said prayers were handed to the clerk, and filed in open court endorsed by the court as follows: "This series of instructions is refused as a series and ex. Wright." The prayers here "refused as a series," with the exception of four, were subsequently offered and passed on separately by the court, and appear hereafter in this bill of exceptions; by the second and third of which, counts 1 and 2 of the indictment were withdrawn from the consideration of the jury and a verdict of not guilty directed as to them; and by the charge the court also directed a verdict of not guilty on the sixth count. The four said excepted prayers were abandoned by the defendant.

118 The Government then offered the following prayer:

"As bearing upon the question of the defendant's guilt or innocence, the jury may and should consider the evidence in the

case which tends to prove that the defendant was a fugitive from justice, and if it finds from the evidence that he did flee from justice that fact, if found to be a fact, while not conclusive evidence of guilt, may, unless explained by something in the testimony, or other facts of the case, be accepted by the jury as circumstances tending to prove that he regarded himself as guilty." (3.)

To which prayer the defendant objected as an incorrect statement of law, and not justified nor supported by the evidence; and because it is misleading; but the court overruled the objection, and granted the said prayer; to which ruling the defendant duly reserved his Exception 31.

The Government then offered the following prayer:

"The jury are instructed as a matter of law that the Government is not required to prove that the exact sum of money mentioned in the indictment was fraudulently converted or appropriated by the defendant to his own use or that such fraudulent conversion or appropriation occurred at the exact date mentioned in the indictment; it is sufficient if any part of such sum was so fraudulently appropriated or converted at any time within three years next before the filing of the indictment." (5.)

To which prayer the defendant objected as being an incorrect statement of law; because it does not confine the jury to the evidence; because it ignores the effect of the presumption of innocence; because it tells the jury in effect that the moneys mentiond in the indictment were in fact fraudulently converted or appropriated
119 by the defendant, and that the exact sum and time of such conversion or appropriation are not material, but any sum or time within three years next before the filing of the indictment is all that is required; but the court overruled the objection, and granted the said prayer; to which ruling the defendant duly reserved his Exception 32.

Thereupon the following occurred:

The COURT: I should perhaps make it clear right here and now, that it is a question which ought to be settled, whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from 27 instructions up to an indefinite number. Some 27 prayers have been submitted here in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial but to save some possible point for reversal in another court. I started to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. Mr. Baker: If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having— The Court: You will not state that either. What I say controls that. Mr. Baker: Then I note an exception to

the court's ruling, and I ask to offer these prayers separately. The Court: I will not permit them to be offered separately in the form in which they are. Mr. Baker: Then I note an exception to the ruling of the court. (33.)

120 The defendant then moved the Court to instruct the jury on all of the evidence in the case to return a verdict of not guilty, because the evidence shows that the property came into the defendant's possession before the Code took effect; because the evidence fails to show ownership as alleged in any of the said four counts of the indictment either at the time alleged therein, or at any time within three years next before the filing thereof; but the Court overruled the motion; to which ruling the defendant duly reserved his Exception. 34.

The defendant then asked the court to instruct the jury as follows: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty." (I)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 35.

The court then instructed the jury, at the defendant's request, as follows: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the first count of the indictment." (II)

The Court then granted the defendant's following prayer: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the second count of the indictment." (III)

The defendant then asked the court to grant the following prayer: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the third count of the indictment." (IV)

121 The Court refused this prayer; to which refusal the defendant duly reserved his Exception 36.

The defendant then asked the following instruction: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the sixth count of the indictment." (V)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 37.

The defendant then offered the following prayer: "The jury are instructed, as matter of law, that in determining the question of whether or not the defendant is guilty as charged in any of the counts in said indictment, they must find that he has had possession of money belonging to some of the persons or bodies corporate mentioned in the several counts of the said indictment, and that that money came into his possession on or after the first day of January, A. D. 1902; that no charge can be made against him for appropriating or converting any money that came into his possession as receiver prior to said date." (VI)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 38.

The defendant then asked the following instruction:

"The jury are instructed under any one of the four counts of the indictment, the government is bound to prove beyond a reasonable doubt, that the persons or corporations, and each of them, therein alleged to be the owners of the moneys mentioned in the indictment, were in existence and the actual owner or owners of the said moneys at the time of the alleged commission of the offense charged, and that unless such existence or ownership at such time and as laid in each or any count, be proved to the satisfaction of the jury be-
122 yond a reasonable doubt, they must find the defendant not guilty." (VII)

The Court refused this instruction; to which refusal the defendant duly reserved his Exception 39. This prayer was then modified and granted as follows:

"The jury are instructed that under either of the two counts of the indictment, the government is bound to prove beyond a reasonable doubt, that the persons or corporations, or one of them, therein alleged to be the owners of the moneys mentioned in the indictment, were in existence and the actual owner or owners of the said moneys at the time of the alleged commission of the offense charged, and that unless such existence and ownership at such time be proved to the satisfaction of the jury beyond a reasonable doubt, they must find the defendant not guilty." (VII A.)

The court then granted the defendant's following prayer, after it was modified by inserting the words "or some of it," where they occur:

"The jury are instructed as matter of law, that they must return a verdict of not guilty on the third count of the indictment, unless they find beyond a reasonable doubt that the defendant was a receiver and had possession of the property and moneys mentioned in the indictment, and that the same belonged to and were the property of the Washington Beneficial Endowment Association at the time of the alleged commission of the offense; that said company had, at the time of the alleged conversion, a corporate existence, and that the defendant, as such receiver, fraudulently converted or appropriated the property or some of it of the said corporation to his own use." (X.)

123 The court then granted the defendants' following prayer, after it had been modified by inserting the phrases "*of* some of them" and "or some part thereof," where they occur, and by striking out the word "joint" before the words "moneys and properties of said persons," where the same occur:

"The jury are instructed, as matter of law, that they must return a verdict of not guilty on the sixth count of the indictment, unless they find, beyond a reasonable doubt, that the defendant was, at the time of the commission of the alleged offense, a receiver, and had in

his possession money and property of Henry Ann Stuart, Howard L. Morrison, Administrator of Zephrine A. Morrison, Mary N. Cassin Administratrix of William D. Cassin, and the Virginia Trust Company, a body corporate, administrator of Alfred Shields; that Howard L. Morrison was, at the time of the alleged conversion, Administrator of Zephrine A. Morrison; that Mary N. Cassin was administratrix, at said time, of William D. Cassin, and that the Virginia Trust Company was, at said time, a body corporate and administrator of Alfred Shields; that the said moneys and properties mentioned in the indictment, were the moneys and properties of said persons or some of them, and that the said defendant, being so possessed of said properties and moneys of the said persons, did fraudulently convert the said properties and moneys or some part thereof, being the properties and moneys of the parties mentioned aforesaid, to his own use." (XI.)

The Court then granted the defendant's following prayer:

"The jury are instructed, as matter of law, that the first paragraph of the decree of the 27th of June, A. D. 1896, revested no title
124 to the real estate that was sold by the receivers, or to the proceeds thereof, in the Washington Beneficial Endowment Association." (XII.)

The Court then granted the defendant's following prayer, after it had been modified by inserting the phrase "or some of them," where it occurs:

"The jury are instructed that under either count of the indictment the government is bound to prove beyond a reasonable doubt, first, that the defendant was a receiver as alleged therein; second, that the moneys mentioned therein came into his possession by virtue of his office or employment as such receiver; third, that such moneys were the property or estate of the persons, or corporations named therein or some of them; and fourth, that the defendant fraudulently converted or appropriated the same to his own use. The intent to defraud is essential and means a criminal intent to deprive the owner or owners absolutely of the said money, and unless such fraudulent intent be shown beyond a reasonable doubt, the defendant must be acquitted." (XIII)

The Court then granted the defendant's following prayers:

The jury are instructed that in this case an intent to defraud is essential and must be proved beyond a reasonable doubt; a mere failure of the defendant to pay over the moneys mentioned in the indictment, even though unexplained, does not raise any presumption that the defendant has fraudulently converted or appropriated such moneys to his own use; nor does the mere fact that the defendant may have converted or appropriated such moneys to his own use, create a presumption that the same was done fraudulently." (XIV)

125 "The jury are instructed that in this case the government is bound to prove the offense charged, and every element thereof, by evidence which satisfies their minds beyond a reasonable

doubt, of the truth of the charge and of every element thereof; that is to say, the evidence must be of such force as to exclude every reasonable hypothesis of the defendant's innocence, and if it be not entirely inconsistent with any reasonable theory of innocence, they must find the defendant not guilty." (XV)

"The jury are instructed that the laws presumes, and they are bound to assume, that the defendant is innocent of the charge against him, and this presumption of his innocence does not yield to a mere preponderance of evidence tending to show his guilt, but only to evidence which establishes his guilt beyond a reasonable doubt, as already defined." (XVI.)

The defendant then offered the following prayer:

"The jury are instructed that the law presumes the defendant to be innocent of the charge against him, and that this presumption continues all through the case and until and unless he be proved guilty beyond a reasonable doubt. This presumption of innocence is stronger than and overcomes any presumption of the continuance of the life or existence of any person or corporation named in the indictment, and also any presumption of the continuance of the ownership of the moneys mentioned in the indictment, even if they may believe that at some time prior to the alleged offense, some certain person or corporation named in the indictment was in existence and was then the owner of such *of such* moneys." (XVII.)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 40.

126 The defendant requested the Court to grant the following prayer:

"The jury are instructed that if they should believe from the evidence that any of the moneys mentioned in the indictment came into the defendant's possession after January 1, 1902, then, before they can find the defendant guilty, they must find from the evidence, beyond a reasonable doubt, that any such moneys which came into his possession after January 1, 1902, were not paid out for legitimate expenses, but were fraudulently converted or appropriated by the defendant Fields to his own use." (XVIII)

The Court refused the prayer; to which refusal the defendant duly reserved his Exception 41.

The defendant then asked the following instruction:

"The jury are instructed that upon the evidence in this case, they may find the defendant not guilty on the two counts of the indictment, and they must find him not guilty on at least one of the counts." (XX)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 42, and when refusing said prayer, the Court of its own motion then gave the jury the following instructions:

"The jury are instructed that upon the evidence in this case they

cannot find the defendant guilty on both of the counts which are submitted to them." (XX A).

The defendant then offered the following prayer:

"The jury are instructed that the mere fact that the defendant was absent from the District of Columbia when arrested, does not raise any presumption of itself, even though unexplained, that such absence was on account of the charge in this case; and further, that even if they fully believe that such absence was on account of such charge, it does not of itself create any presumption what-
127 ever of the defendant's guilt." (XXII)

The court refused this prayer; to which refusal the defendant duly reserved his Exception 43.

The defendant then asked, and the court granted, the following instruction:

"The jury are instructed that they are absolutely prohibited from giving even the very slightest weight or consideration or attention to the fact that the defendant has not testified in this case, as a witness in his own behalf, and no presumption whatever can be indulged against him by reason of such fact." (XXIV)

The defendant then asked the court to instruct the jury as follows:

"The jury are instructed in this case that the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in consideration of the evidence." (XXV)

The court refused this prayer; to which refusal the defendant duly reserved his Exception 44.

The court then granted the defendant's following prayer:

"The jury are instructed, as matter of law, that, in order to find the defendant guilty, they must find from the evidence beyond a reasonable doubt, that the property and moneys mentioned in the indictment were converted by said defendant, Thomas M. Fields, on or after the 1st day of January, 1902." (XXVI)

The defendant then asked the court to grant the following prayer:

"If the jury believes from the evidence that any part of the sums of money mentioned in the indictment were delivered by the
128 defendant Fields to his co-receiver, Lipscomb, then they are instructed, as matter of law, that as to that money so delivered the defendant Fields is not guilty of embezzlement, and they shall so find." (XXVII)

The court refused this prayer; to which refusal the defendant duly reserved his Exception 45.

The defendant then moved the court to require the Government to elect on which of the two remaining counts it would go to the jury; but the court overruled this motion; to which ruling the defendant duly reserved his Exception 46.

The Assistant U. S. Attorney then argued to the jury and during his argument said "the evidence shows the defendant to be a common thief," to which statement the defendant objected as improper

and not based on the evidence in the case; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 47.

The said attorney further stated to the jury that "the evidence means that Eckloff said to Fields "take that out of my bank. I won't have you deposit trust funds to your private account;" to which statement the defendant objected as improper; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 48. The said attorney then exhibited to the jury the aforesaid certificate of deposit of November 8, 1901, and stated to the jury as follows: "I want you gentlemen to look at this. The first signature on this is a forgery. The name of Mr. Lipscomb was forged;" to which statements and each of them the defendant objected as improper and contrary to the evidence, and because there is no testimony that justifies the assertion that any forgery has been committed; and because the defendant is not on trial
129 for any such offence; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 49. The said attorney then exhibited to the jury the checks signed by the defendant on the aforesaid account No. 35191, which checks had been offered and received in evidence. The defendant objected to any of said checks being shown to the jury because the endorsements thereon had not been proven and for this reason had been ruled out by the court. The said attorney replied that he did not offer them as genuine endorsements of these people; that he will show them to the jury; and that he does not say that the endorsements of the parties are genuine or not; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 50. The said checks were then handed separately to the jury, and they examined both sides thereof. The defendants counsel stated that his objection and the ruling might be considered to apply to each check. The Assistant U. S. Attorney then said to the jury: "Now, about the ownership. Well, I believe I will leave that to Mr. Beach." The defendant then moved the court to require the Government to make a full and fair opening, on the ground that he is entitled to it, and is entitled to have the Government state its contentions as to the ownership in his opening argument to the jury. The court said: "I cannot require him to make a full opening, or to say anything about it, unless he wants to." The said attorney then argued to the jury, from the defendant's letter of 1904, that the moneys belonged to the Washington Beneficial Endowment Association. The said attorney then stated to the jury: "And so they found him there posing as Dr. Brown—Dr. Brown, treating people as a physician, trying to break into another honorable profession, Dr. Brown—God help his patients if he treated them as he did his clients;"
130 to which statements the defendant objected as improper and not based on the evidence; but the court overruled the objection; to which ruling the defendant duly reserved his Exception

51. The said attorney then said to the jury that the defendant "did not even try to prove a good reputation;" to which statement the defendant objected. The court said that he did not have to, and that the remark ought to be withdrawn; and Mr. Easby-Smith thereupon withdrew the remark. The said attorney then said to the jury: "And you have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouth-pieces of the defendant, who has conducted his own defense;" to which statement the defendant objected as improper. The court sustained the objection, and Mr. Easby-Smith at once withdrew the statement in the hearing of court and jury. The said attorney referred in his argument to the jury to the fact that the defendant is a lawyer; to which statement the defendant objected as improper; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 52.

The defendant's counsel then addressed the jury, and stated that in the said Auditor's Report of July 31, 1900, the Auditor had decided that the said Washington Beneficial Endowment Association had parted with all its ownership and interest in the said property and moneys by conveying the same absolutely to the said Commercial Alliance Company on August 9, 1894, and had never thereafter re-acquired the same, and that the said Association had been dissolved and had gone out of existence on said August 9, 1894; and was about to read that part of the said Report to the jury;
131 whereupon the Government objected on the ground that it had offered in evidence only Schedule A of said Report, and not the whole of said Report; which objection the court sustained; to which ruling the defendant duly reserved his Exception 53. In answer to a question put by the defendant's counsel, the U. S. Attorney here said that the Government contends that the said Association was the owner of said moneys up to May 5, 1904, and that thereafter the persons named in the sixth count of the indictment were the owners thereof.

The U. S. Attorney then addressed the jury in conclusion and, among other things, said:

"It is for you to say Gentlemen, whether the dead man's money will go to the widow, whether the ward's money shall go to the guardian, or whether it shall be stolen;" to which statements and each of them, and to which line of argument, the defendant objected as improper and not based on the evidence, and as intended to appeal to the prejudices of the jury; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 54.

The Court then charged the jury as follows:

The COURT. Gentlemen of the Jury, the indictment originally contained eight counts. Up to this moment such proceedings have been had as that the responsibility of determining any of these counts, save two, has been withdrawn from you; the third and the sixth counts alone being now before you.

Respecting counts of an indictment, counts are nearly different charges. When the question of the ownership of property is a question material to the merits of an inquiry, and before the trial
132 the District Attorney is in doubt as to whether the ownership be in one or the other of two, it is not only his privilege but his duty to put in the indictment two counts and submit to the Court and jury for their determination on the evidence the question whether the ownership be in the one or the other. This and no more the District Attorney has undertaken to do by incorporating in this indictment Count No. 3 with Count No. 6; so that in presenting the two here he puts upon the Court the duty of determining in the first place whether or not there is any evidence which so tends to prove the ownership as laid in both counts as that the Court ought to submit both counts to you for your determination which of two the ownership if in either was in.

I have examined these counts with considerable care and am in no wise in doubt, that the sum of money charged in each count is the same money that was charged in the other count. The sixth count, averring ownership in four persons, avers that they became owners at a time which by the proof is shown to have been the 5th day of May, 1904.

There is no evidence in this case which tends to prove that any of the money which is identified in these two counts was embezzled by the defendant after the 5th day of May, 1904, that is to say, the date upon which the evidence shows that these four became owners, if they ever did become owners. Therefore there is no evidence in the case which would justify you in finding a verdict of guilty on the sixth count, or even in considering it, and that count is now withdrawn from your consideration.

So that the case stands before you upon the question of the guilt or innocence of the defendant under the third count of the
133 indictment. That count charges that he embezzled, while a receiver, the property of the Washington Beneficial Endowment Association in the sum of $15,974 as the count avers.

The offense of embezzlement, is defined as follows:

"Any receiver into whose possession money or other property of the property of any other person may come by virtue of his office or employment who shall, fraudulently convert or appropriate the same to his own use shall be punished," etc., as in the statute pointed out.

Therefore the first consideration for your determination is, whether or not the evidence satisfies you beyond a reasonable doubt that the defendant was a receiver, and as such received the property of another person, that person being identified in this count as the Washington Beneficial Association.

According to the formal papers which have been offered in evidence pertaining to the litigation in the equity cause, you may take it as a matter, settled by the proceedings of that court, that the defendant was a receiver as charged in this indictment. It is a

question of fact for you to determine from all the evidence whether or not, after he was receiver, he did receive into his possession as receiver property which was the property of the Association which is mentioned in the indictment.

That brings you to the consideration of the questions which have been argued by counsel, pertaining to a sale of real estate, which is claimed by one or the other to have been made by the receiver.

If you find by the evidence that a portion of the property of the Washington Beneficial Endowment Association came into
134 possession of the defendant and his co-receiver, then it is entirely immaterial into what particular form that property may have been transposed prior to an embezzlement, if there was an embezzlement: that is to say, if they took possession of the property in the form of real estate while it was the property of this Association and it was afterwards converted into money through a sale by them under the Courts order, then that money was as much the property of the original owner as the original real estate was the property of the owner.

Now coming to the consideration of the second point made essential by the statute—the property of another person.

The evidence in the case must satisfy you beyond a reasonable doubt that the "other person" named in this indictment, that is to say, the Beneficial Endowment Association, was the owner of the property concerned in this investigation.

This count charges that that Association was an incorporated Company. The incorporation of a company may be proved in one of two manners. Inasmuch as corporations are only created through the manner provided by the law, which involves the issuance of a certain certificate or charter which determines their existence, if that or a copy of it can be produced, that is sufficient to determine the question of the existence of such a corporate body at that time.

There is evidence before you which tends to show that at a certain time a certificate, according to the requirements of the law, was filed in the Recorder's Office, but that it has been destroyed. If you find from all the evidence which has been submitted upon that point, including testimony concerning the identification of
135 the record which was read, that a paper of which that record is a copy was filed in the Recorder's office at the time indicated by that record, then that would justify you in assuming that the corporation has been duly organized and created. If you are not satisfied beyond a reasonable doubt from the evidence that such a paper was filed, you may inquire whether or not as a matter of fact in the commercial world an organization of this name was representing itself as a corporation and as such was doing business under the management of such officers as are required in corporate enterprises, that is to say, a president, the secretary and the like; and if you find from the evidence beyond a reasonable doubt upon that point, that is that the Association was doing business in this District as a

corporation and representing itself to be a corporation, that is sufficient to justify you in finding for the purposes of this inquiry that it was a corporation.

If you find that it was a corporation, then you must proceed to determine whether or not at a later period, at which it is worded in this indictment and claimed by the District Attorney that the defendant received this property and converted the property after receiving it, you must find whether at that time it was the owner of that property. That will call upon you to pass upon the question which is urged by the counsel for the defendant, whether or not this corporation was in or out of existence, if it ever was created The law in that respect is thus:

If you find that the corporation ever was in existence in either of the ways I have pointed out, and if you further find that while it was in existence it acquired ownership of this real estate which has been identified, and that the ownership of the real estate continued
136 to be in that corporation, then it is utterly immaterial whether that corporation was continuing to do business or continuing to exercise the function of a corporation, so long as it never was formally dissolved by judicial proceedings, concerning which there is no proof.

Proceeding then to the consideration of the next essential characteristic of the offense, as defined by the section, it is thus:

"Who shall fraudulently convert or appropriate the same to his own use."

That expression "fraudulently convert or appropriate to his own use" is used by the law to designate a particular intent which must prevail in the mind of the individual concerned at the time of the conversion to his own use, if there be a conversion to his own use; that is to say, a fraudulent intent. For the purposes of this section, whoever converts to his own use the property of another, and at the moment of conversion intends permanently to deprive the owner of his property in that property, that conversion has been a fraudulent conversion; because the essence of the "fraudulent intent," as applied to conversions, is that the law requires no more than proof that the intent permanently to deprive the owner of his property shall have accompanied the act of conversion; and if that intent existed concomitantly with the act of conversion, it was a fraudulent intent.

With respect to the meaning of the phraseology "convert or appropriate the same to his own use," it is plain enough. It needs no further definition.

Certain evidence has been offered, first, in the way of letters; second, that which the District Attorney claims to show flight, which upon the part of the government, it is contended prove upon
137 the part of the defendant a consciousness of guilt. You are entitled to and you should examine these letters, read them and ascertain as far as you can from those letters, in the light of the other facts which are offered to your minds by the other evidence in the case what the intention of the defendant was at the time he wrote

those letters; whether or not he intended by them to acknowledge a consciousness of guilt of embezzlement as charged in the indictment. If he did, you are entitled to take it into consideration as an evidence of a confession or admission of his guilt.

So with respect to the point of flight. If you find from all the evidence in the case that there was flight, that the defendant departed from this jurisdiction for the purpose of avoiding prosecution for this particular offense, then you are entitled to take that into consideration as tending to prove his guilt; but if you find that although there was flight it was not so connected with this particular offense as that you believe he ran away because of his fear of a prosecution, then it ought not to influence you one way or the other.

In the law whenever a defendant is put on trial he is presumed to be innocent until the contrary is established to the requisite degree of certainty. The logic of it is that when an affirmation is made against an individual it cannot be taken for granted, because denial is just as positive as assertion; but inasmuch as the experience of human nature has developed that in the ordinary course of things men are not always committing crimes, when one is charged by the Government with the commission of crime he is taken in the law to be innocent until the evidence proves him guilty to the satisfaction of the jury, and beyond a reasonable doubt.

138 The degree of certainty to which the proof must go in a criminal case is this, that the jury must be satisfied of every essential to guilt beyond a reasonable doubt. That phrase, however, is not one which the law permits a juryman to use as a blanket behind which to screen himself in order to escape an unpleasant duty, providing that duty is made clear to him by the evidence. In human affairs absolute certainty is not always attainable. In the very nature of things reasonable or moral certainty is all that can be attained to on many subjects. When a full, fair and candid consideration of all the evidence in the case produces in the minds of the jury a conviction of guilt, and fully satisfies them that the defendant is guilty, it is their duty to say so; but if an equally fair, candid consideration of all the evidence does not fully satisfy the jury, but only leads them to believe that there are strong suspicions of guilt, the only safe course is to acquit.

Respecting a point which was touched upon by the District Attorney—although this indictment charges the defendant with having embezzled the sum of $15,974, it is not essential that the proof should go so far as to make out that particular sum, and inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in your dealing with those various items.

If you find from the evidence that after January 1st, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that precon-

ceived plan, then you would be justified in finding him guilty
139 concerning all the embezzlements that you find the proof makes out; but if you find that there was not such a plan preconceived by him before a first embezzlement, and conclude from the evidence that each conversion by him, if there was a fraudulent conversion by him, was in itself distinct from every other, if there were other fraudulent conversions, then you would only be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree. But in determining, in that aspect of the case, the question of his guilt upon a particular conversion, you will be entitled to take into consideration evidence which you find proves other conversions of the same fund; but only as tending to aid you in coming to a conclusion upon the question of intent —if you find he converted an item in question, whether or not you believe that the conversion of that particular item was done with fraudulent intent.

Much has been said concerning the fact that the defendant is a lawyer. If there is anything in the nature of the offense of embezzlement which is calculated to make the human mind regard it as especially heinous when committed by a lawyer, that very fact is one which ought to put you on your guard in this case, so that you do not convict this man of being a lawyer instead of being an embezzler. The consideration ought to have nothing to do with influencing your minds. If he is innocent, this is the only tribunal to which he can come for vindication. If he is guilty, this is the only tribunal to which the Government can come for the administration of the law. Therefore you should deal with the case and every question in it with minds that are utterly devoid of passion.

If you find that his guilt is made out with the degree of cer-
140 tainty which is required by the law, no consideration of sympathy or favor or fear or any human emotion ought to prevent you from so declaring; but if, on the other hand, you in your minds are honestly of the opinion that his guilt is not made out beyond a reasonable doubt, then no consideration whatever ought to permit you to be weak enough to yield to a verdict of guilty.

You may retire and select your foreman.

Mr. BAKER: If your honor please, ought not the record be made straight by taking a verdict upon the three counts of not guilty before the jury retires?

The COURT: That verdict may be entered. There is one thing I neglected to say. The special charges which were read by both counsel in your presence, counsel for the Government and for the defense, are the law of the case in connection with the general charge.

Mr. BAKER: Your honor takes the verdict on the three counts?

The COURT: Yes.

The jury thereupon retired to consider their verdict.

The jury then returned a verdict of guilty on the said third count

of the indictment and not guilty on the first, second, and sixth counts thereof, in accordance with the instructions of the court.

The foregoing exceptions were taken by the defendant, and were duly noted by the presiding Justice on his minutes, before the jury retired to consider their verdict.

To the end that justice may be done in the premises, and that the questions raised by the foregoing exceptions may be reviewed and determined on appeal, the defendant prays the court to sign this his Bill of Exceptions, as of and for the time the same were
141-146 noted; which is accordingly done, now for then, this tenth day of November, A. D. 1905.

DAN. THEW WRIGHT, [SEAL.]
Justice.

Service of copy of foregoing Bill of Exceptions acknowledged this 28th. day of July, A. D. 1905.

J. S. EASBY-SMITH,
Asst. U. S. Attorney, D. C.

Extension of Time to File Record.

Supreme Court of the District of Columbia.

MONDAY, *November* 13, 1905.

The Court resumes its Session, pursuant to adjournment, Mr. Justice Wright, presiding.

No. 24683. Convicted of Violation of Section 841 Code, D. C.

UNITED STATES
vs.
THOMAS M. FIELDS.

Upon motion of the defendant by his Attorney Frank J. Hogan, Esq., it is by the Court Ordered that the time for filing the transcript of the record in the Court of Appeals of the District of Columbia, on the appeal taken in this case, be and the same hereby is further extended to and including December 10, 1905.

* * * * * * *

147 *Praecipe for Transcript of Record.*

Filed November 13, 1905.

In the Supreme Court of the District of Columbia.

No. 24683. Cr. Doc.

UNITED STATES
vs.
THOMAS M. FIELDS.

It is hereby stipulated and agreed, this 13th. day of November, A. D. 1905, by and between the respective parties to this cause, by their counsel, that the clerk of this Court shall forthwith prepare the transcript of the record on the appeal herein, which transcript shall consist of the following:

(1.) Indictment.
(2.) Demurrer.
(3.) Order of severance, M. 39 p. 425.
(4.) Order on demurrer, M. 39, p. 430.
(5.) Motion and affidavit for commission and letters rogatory.
(6.) Order granting motion for commission and letters rogatory, M. 39, p. 441.
(7.) Motion and affidavit for bill of particulars.
(8.) Motion and affidavit for return of papers.
(9.) Interrogatories to Charles F. Miller.
(10.) Interrogatories to Henry D. Hotchkiss.
(11.) Interrogatories to William T. Gilbert.
(12.) Motion and affidavits (3) for continuance.
(13.) Affidavit of U. S. Attorney as to continuance.
(14.) Order overruling motions for bill of particulars, return of papers, and continuance; plea; jury sworn; M. 39, p. 444.

148 (15.) Memorandum of issuance and return *non est* of *Spas. ad. test.* for defendant's witnesses George H. Tichenor, Daniel McConville.

(16.) Verdict; order fixing bail, etc. M. 39 p. 452.
(17.) Motion in arrest.
(18.) Motion and affidavits (3) for new trial.
(19.) Affidavit of Assistant U. S. Attorney as to new trial.
(20.) Order overruling motions in arrest and for new trial; judgment, appeal; waiver of citation; bonds for bail and costs fixed; bill of exceptions submitted, M. 41, p. 15.
(21.) Memorandum of approving and filing of appeal bond.
(22.) Order prolonging term and time to file transcript, M. 41, p. 42.
(23.) Bill of exceptions settled and filed, M. 41 p. 56.
(24.) Order extending time to file transcript, M. 41, p. 119.

(25.) Bill of exceptions.
(26.) Transcript of docket entries in Cr. No. 24664.
(27.) Transcript of docket entries in this cause.
(28.) This praecipe and stipulation.

FRANK. J. HOGAN,
Attorney for Defendant.
J. S. EASBY-SMITH,
Special Assistant Attorney for United States.

149 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 148, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 24,683 criminal, United States, *vs.* Andrew A. Lipscomb, *et al.*, as the same remains upon the files and of record in said court.

Seal Spreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 8th. day of December, A. D., 1905.

JOHN R. YOUNG, *Clerk.*

150 In the Court of Appeals of the District of Columbia.

January Term, 1906.

General Calendar No. 1633, Special Calendar No. —.

THOMAS M. FIELDS, Appellant,
v.
UNITED STATES, Appellee.

Brief Statement of Supposed Errors.

Comes here now the appellant and, under the provisions of Rule VI, Sec. 5, of this court, files this, a brief statement of the supposed errors for which he prosecutes this appeal, as follows: The court erred—1. In holding Code D. C. Sec. 841 to be retrospective and applicable to this case. 2. In holding said section so construed and applied to be constitutional. 3. In overruling the demurrer to the indictment. 4. In denying time to execute the order for commission and letters rogatory. 5. In denying the motions for (*a*) return of papers, (*b*) bill of particulars, and (*c*) continuance. 6. In refusing

to direct a verdict of not guilty on the third count of the indictment. 7. In (*a*) refusing appellant's prayers and (*b*) in granting appellee's prayers, to which appellant excepted. 8. In overruling the motions (*a*) in arrest and (*b*) for new trial. 9. In other respects stated in appellant's various exceptions,

Designation for Printing.

For the consideration of the questions involved, the appellant thinks that the following parts of the transcript of record are not material to be printed, and that the clerk should omit: P. 1, all after line 8. P. 2 all. P. 3, all except last seven lines. Pp. 5–13 both inclusive. P. 16, all after line 8 except signatures. Pp. 27–35, both inclusive. Pp. 142–146, both inclusive.

FRANK J. HOGAN,
Attorney for Appellant.

Service of copy of foregoing statement of errors, and designation for printing acknowledged this 12th day of December, 1905.

J. S. EASBY-SMITH,
Special Assistant U. S. Attorney D. C.

Endorsed on cover: District of Columbia supreme court. No. 1633. Thomas M. Fields, appellant, *vs.* United States. Court of Appeals, District of Columbia. Filed Dec. 8, 1905. Henry W. Hodges, clerk.

TUESDAY, *March 6th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

The argument in the above entitled cause was commenced by Mr. F. J. Hogan, attorney for the appellant, and was continued by Mr. J. S. Easby-Smith, attorney for the appellee.

WEDNESDAY, *March 7th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

The argument in the above entitled cause was continued by Mr. J. S. Easby-Smith, attorney for the appellee, and was concluded by Mr. J. C. Gittings, attorney for the appellant.

No. 1633.

THOMAS M. FIELDS, Appellant,
v.
UNITED STATES.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

An indictment presented April 3, 1905, charged Thomas M. Fields and another with embezzlement, in eight counts. Some of these counts were held defective on demurrer, and a verdict of not guilty was directed on others, leaving the third count on which Fields was found guilty, and from the judgment on which he has appealed.

The third count charges, that on November 23, 1903, in the District of Columbia, the said Fields and another were receivers under an order of the Supreme Court of the District entered November 6, 1894, in the case of the Washington Beneficial Endowment Association against the Commercial Alliance Life Insurance Company; that on said date the said receivers (naming them) had possession of a certain sum of money, to wit the sum of $15974.07, of the said value, etc., "being the property and moneys of the Washington Beneficial Endowment Association, a body corporate," which had come into their possession by virtue of their office and employment as such receivers; and that they so having the same in their

possession on November 23, 1903, in the District aforesaid, "and while they were such receivers as aforesaid did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby and then embezzle the same" etc.

Fields was tried alone and after motions in arrest of judgment and for new trial had been overruled, was sentenced to be imprisoned in the penitentiary and kept at labor for the term of five years.

Fifty-seven errors in the proceedings on the trial have been assigned.

It would consume space unnecessarily to discuss these seriatim, as they may be condensed into certain propositions on which the appellant relies.

1. The first proposition relates to the sufficiency of the indictment on objections raised by demurrer and in arrest of judgment.

The indictment is founded on Section 841 of the District Code which reads as follows: "Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

(1.) We are of the opinion that in respect of form the indictment is sufficient. It charges with precision and certainty, that the defendant was appointed a receiver by order of court, that by virtue of said appointment he came into possession of a certain sum of money, alleged to be the property of the Washington Beneficial Association, and that on a certain date, in the District of Columbia, he unlawfully and fraudulently converted and appropriated the same to his own use, and did then and there embezzle the same. This sets out all the necessary elements of the offence as defined in the Section aforesaid without any uncertainty or ambiguity. Evans *v.* U. S., 153 U. S., 584, 587; Potter *v.* U. S., 155 U. S., 438, 445; Knoll *v.* U. S., 34 W. L. R., 94; Moore *v.* U. S., 160 U. S., 268. In the case last cited an indictment was held defective because it did not allege that the money embezzled came into the hands of the defendant in his capacity as an employee. In other respects the indictment which, like this, followed the language of the statute, was upheld. That defect does not appear in the present indictment as it alleges the appointment as receiver and that the money came into the possession of the defendant in that capacity. The allegation of the order of appointment as receiver was sufficiently alleged to warrant its admission in evidence, and that is all that the rules of pleading require.

(2.) Nor was it necessary to allege the particular manner in which the defendant unlawfully and fraudulently converted the money and appropriated the same to his own use. These words have a well known signification, common as well as legal, and are

of common use in indictments for larceny and embezzlement. Gassenhiemer *v.* U. S., 34 W. L. R., 80, 82; Moore *v.* U. S., 160 U. S., 268, 271; Grin *v.* Shine, 187 U. S., 186, 189.

2. The indictment being sufficiently certain in its terms, the question whether the District Attorney should be required to file a bill of particulars was a matter within the discretion of the trial court; and there is nothing to indicate the slightest abuse of that discretion.

3. The question of vital importance in the case, and which has been argued with great force and earnestness, arises on the construction of Section 841, and is presented on demurrer to the indictment, on instructions prayed, as well as on the motion in arrest.

The fact which may be inferred from the indictment is made certain by the evidence, namely, that the money came into the possession of the receivers prior to the enactment of the Code, although it was embezzled thereafter. The contention is that by the plain language of the Section it is not intended to apply to money or other property thereafter embezzled unless the same had come into the possession of the receiver after the date that it went into effect. The words used are, "into whose possession money * * * *may come* by virtue of his office" etc. It is argued that the words "may come" are synonymous with "shall come," and can have no application to anything in the past, but solely to the future.

Considering the whole section, and other related sections defining particular species of embezzlement, we are not prepared to accept this conclusion as to the plain meaning of the phrase used. Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. The chapter of which this section forms a part undertakes to define and punish every species of embezzlement. One relates to every person who "being chargeable with the collection, safe-keeping," etc. of money or other property, fraudulently converts to his own use the same so "received, controlled or held by him," etc. (Sec. 833). Another applies specially to agents, attorneys, clerks, or servants who shall convert to their own use anything of value which "shall come" into their possession etc. (Sec. 834). Section 837 covers the case of "any person intrusted with anything of value to be carried for hire, or being an inn-keeper and intrusted by his guest" etc. Sec. 838 governs the case of any warehouseman, factor, and so forth, who sells, disposes of, or applies or converts to his own use any property "intrusted or consigned" etc. The general purpose of these sections, as we have seen, is to define and punish embezzlement in the various ways, and by the various persons who may commit the offence, and though different forms of expression are used their general signification is practically the same. The act of embezzlement is the thing to which each section is specially directed, and while, as to that, it is necessarily prospective in its operation, it does not follow that it was intended, also, that there should be no punishment for the embezzlement of money or property except such as

might thereafter come into the possession of the party charged with a duty in respect thereof. It is inconceivable that Congress intended to make a distinction in respect of property thereafter embezzled, dependent upon the time when the same shall have come into the possession of the embezzler. There is no possible foundation in law or morals for such a distinction, and unless compelled by an unmistakeable expression of such an intention, no court would be justified in adopting a construction that would give it recognition. "Nothing is better settled than that statutes are to receive a sensible construction, such as will effect the legislative intent, and, if possible, so as to avoid or reject an absurd conclusion." Lau Ow Bew *v.* U. S., 144 U. S., 47, 59.

With one exception, none of the multitude of cases cited in appellant's brief covers the particular phase of statutory construction here presented. All are distinguishable, and it is unnecessary to consume space by their separate review. The exception referred to is the decision of an inferior court of another jurisdiction, unofficially reported.

We are of the opinion that the learned trial justice did not err in holding that Section 841 comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect, when embezzled thereafter.

4. After his demurrer to the indictment had been overruled, the defendant, on May 4, 1905, filed a motion, supported by affidavit, for an order compelling the District Attorney to return to the office of the clerk all of the original papers and records in equity cause No. 15907, which is the one in which defendant was appointed as receiver and which contained all the proceedings relating thereto. It appeared from the sworn reply of the District Attorney to said motion, that the papers referred to filled a large basket, and had been obtained from the Clerk of the Supreme Court of the District, because they were needed in preparing the case for the prosecution, as well as to preserve the same because some of the files had been secretly taken from said office; and that access thereto had never been denied to the defendant or his attorneys, but on the contrary they had been afforded facilities for examining the same. In overruling the motion the court announced that if defendant would specify the particular papers needed by him, the same would be ordered into his possession for copy, or he might examine the whole of them if desired. It nowhere appears that the defendant suffered any detriment by the denial of his motion. We are of the opinion that the action of the court was in the discretion necessarily committed to it in such matters, and in the absence of any indication of abuse is not matter of review.

5. On May 8, 1905, the day set for the trial of the case, the defendant filed a motion for continuance to procure the testimony of three witnesses, two of whom resided in New York City, and one was then somewhere in Europe where he expected to remain for two years. The supporting affidavit alleged that on May 3, 1905, defendant filed an affidavit and motion for an order for a commission and letters rogatory to take the testimony of said witnesses, which

was granted. One of the New York witnesses, William T. Gilbert, had been the receiver of the Commercial Alliance Insurance Company (one of the parties to the equity suit No. 15907) and the other, Hotchkiss, had been his attorney. By these, it was alleged, he expected to prove that neither of the corporations recited as owners of the money intrusted to him as receiver, was the owner of the same, and thereby to overcome the proof of the government as to the ownership alleged.

By Miller, it is alleged, he expected to prove that a certain large part of the money had passed lawfully into the possession of defendant's co-receiver (also indicted with him), for the sole purpose of *bona fide* investment in certain safe securities, and that the same never came into the exclusive possession or control of affiant; and that he did not convert the same or any part thereof to his own use. "This proof to supplement other evidence proposed to be offered as to the lawful disposition of all of the moneys mentioned in the indictment, as far as this defendant is concerned." And further, that said Miller is the only witness to corroborate this defendant as to the said part of the said moneys. It was further alleged, that he expected to prove by all three witnesses that about eleven years ago the Washington Beneficial Endowment Association, named in the third count, sold and by deed conveyed away absolutely all of whatever right, title and interest it ever had in the moneys and property mentioned in the indictment, etc.

It has been expressly declared by the Supreme Court of the United States: "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." Isaacs *v.* U. S., 159, 487, 489. We perceive no abuse of that discretion in this case. Passing by the question of the right to take the depositions of witnesses in a criminal case, it does not appear that the personal appearance of the New York witnesses could not have been obtained upon application for the proper process for that purpose. However this may be, their proposed testimony as regards the ownership of the fund by the Washington Beneficial Endowment Association—the owner alleged in the third count—would have been incompetent. That Association had attempted to sell its property, from the sale of which the money in the hands of the receivers had been realized; but that sale had been annulled as fraudulent by decree of the Equity Court which appointed the receivers to take possession of the proceeds. Their testimony could add nothing to the fact that such sale had been made, and they could not have been permitted to contradict the decree by which it had been annulled.

As to the witness Miller, his location was uncertain and there was nothing to show a reasonable probability that his evidence could be procured within any definite period if at all. Moreover, the particular facts that he was expected to testify to were not stated. The general statement that he would testify that a large and specific sum of the moneys had passed lawfully into the hands of defendant's

co-receiver, for the sole purpose of *bona fide* investment, does not show a good defence. The funds were in the possession of the receivers jointly, subject to the control and disposition of the court. They had no authority to pay them out or to invest them in securities of any kind save upon order of the court; and it is not pretended that such an order was made. Nor could one of them draw the money from the bank of deposit without the other's signature. It would be an extreme case that would require a court to continue a case indefinitely for the purpose of procuring evidence, even if shown to be plainly competent and material.

6. The next proposition, founded on errors assigned, relates to the ownership of the money which was alleged in the third count to be in the Washington Beneficial Endowment Association, and to the proof of the corporate existence of the same.

(1.) The records of the equity case were introduced with orders therein rendered, showing that the real estate conveyed by the Endowment Association to the Commercial Alliance Insurance Company had been seized and put in the hands of receivers, who were attorneys representing certain of the parties therein. That the conveyance had been annulled, and the property converted into money which passed into the hands of the receivers. The litigation began in 1894, and its history is to be found in Gilbert *v.* Endowment Association, 10 App. D. C., 316, and 21 Idem 344.

Pending the litigation concerning the rights of various creditors and members of beneficiaries of the Endowment Association in the distribution of its assets, the money remained in the hands of the receivers; and reports signed by defendant and his co-receiver showed that the amount charged in the indictment was in their possession by virtue of their appointment and acceptance of the trust. The money into which the land and other assets had been converted took their place and the receivers became responsible therefor.

The conveyance of the property having been annulled, the legal ownership of the same and its proceeds remained in the Endowment Association until a distribution thereof among its creditors and beneficiaries could be determined and carried into effect. That the fund may have been finally ordered to be distributed, after the alleged date of its appropriation by the receivers to their own use, or that it may hereafter be, upon final settlement of the litigation, can have no effect upon that ownership, which was then in the Endowment Association for all the purposes of this case.

(2.) Under the allegations of the indictment it was necessary to prove that the Washington Beneficial Endowment Association, the alleged owner of the fund, was a body corporate.

This proof was attempted to be made on two ways, first by evidence tending to show actual incorporation in April 1877, through proof thereof from the records of the Register of Deeds for the District of Columbia, and second, by reputation. There were some irregularities in the proof of the articles of incorporation, and as it would require considerable space we refrain from its discussion. Proof could either be made in that way or by other evidence tending to show that the corporation was *de facto* organized and acting as such. U. S. *v.*

Amedy, 11 Wheat. 392, 409. Of this there was ample evidence through several persons who had participated in the original organization of the corporation or had had stock in the same. It was shown to have been actually engaged in business from 1877 to 1894 at which time, being insolvent, it undertook to sell its property, real and personal, to the Commercial Alliance Insurance Company, and ceased to do business. It was sued and described as a corporation in the equity suit in which the defendant was appointed a receiver. No matter that it ceased to do business in 1894, and remained thereafter insolvent; it was and still is a corporation for all the purposes of the equity suit and of this case. It is well settled that a corporation does not cease to exist through the discontinuance of its bsuiness, merely, though ceasing to maintain its active organization, or by becoming hopelessly insolvent. Brown *v.* Cement Co. 1 App. D. C., 232, 236. It may be remarked, also, that the defendant, who held the money by appointment as receiver in the equity suit which recognized the corporation as one *de facto,* at least, and under a decree declaring its ownership of that money for the purposes of the suit, is in no attitude to deny its *de facto* status.

7. Several assignments of error relate to exceptions taken to the introduction of certain papers, reports and orders entered in the equity case. These were identified generally as being parts of the said record, and the orders read were those that had been signed by the presiding justice, and which are thereafter customarily copied in the minutes of the court. The objections were in general that these related to money in possession before the Code, and showed, also, that the property originally ordered into the possession of the receivers was real estate, though they showed, also, that the land had been converted into money and that money delivered to the receivers. Both of these questions have been heretofore disposed of.

It is now urged that the orders as entered in the minutes were the best evidence of the same, and that those found in the papers were not therefor admissible. The answer to this is, that no such objection appears in the bill of exceptions, and comes too late. Had it been made at the time, the prosecution, being put upon notice, might have waived the objection by reading the orders from the minutes. The several receivers' reports showing their account and the possession of the balance charged in the indictment, were not only shown to be papers belonging to the record of the equity suit, but defendant's signature thereto was proved also. The substantial objection to these, also, was that they showed the possession of the money prior to the enactment of Section 841 of the Code.

8. Many points made on the refusal of instructions prayed by the defendant, and on exceptions taken to the charge of the court, have been completely covered in the foregoing portions of this opinion, and such as remain open may be considered under one head.

(1.) The exception taken to the refusal of the court to consider the twenty-seven prayers of the defendant submitted altogether is of no consequence, because each of these was thereafter submitted separately, and either given or refused. The remarks of the court

upon the practice of sending up a series of written instructions joined together, may have been unnecessarily severe, upon counsel, for it is not always practicable to make a bill of exceptions reflect all of the surrounding conditions of a particular event in a long and hotly contested trial, but we find nothing therein calculated to influence the jury against the defendant. It is said, on behalf of the prosecution, that the jury were not in fact present when the foregoing occurred. The bill of exceptions containing no recital of the fact of the presence or absence of the jury, it is to be presumed that they were present.

(2) The majority of these prayers when offered separately were granted. Some were founded on defendant's contention in respect of Section 841, while others related to other counts of the indictment—all of which related to the same act of embezzlement, but charged a different ownership than that of the third count—on which the jury were directed to return verdicts of not guilty.

(3) On a refused prayer to find the defendant not guilty on the third count, the sufficiency of the evidence of the fraudulent conversion of the money is assailed. The bill of exceptions does not recite that it contains all of the evidence offered on behalf of the Government, though at the close of that offered for the defendant it recites: "The foregoing is the substance of all of the evidence offered by the defendant. The Government then announced that it had no further evidence to offer." While a bill of exceptions purporting to contain a recital of evidence, apparently full and in regular order of sequence, may, under the particular circumstances of a case, be sometimes accepted as a complete statement in substance of all of the evidence, this one cannot be so taken, because it is apparent from the charge of the court that certain letters of the defendant were offered as tending to show an acknowledgment of guilt, and the same are not recited or mentioned in the bill of exceptions. Taking the evidence as recited, however, we think it sufficient to support the verdict. It showed that the money was in the possession of the receivers; that it had been deposited in a Trust Company by sanction of the court to await the result of the reference to the Auditor, and appeals that were taken in which the execution of the decrees of the trial court were superseded; that it was removed into other banks without an order to that effect, and deposited in the names of the two receivers as individuals; that it was withdrawn through a series of checks cashed at the counter generally by defendant; that when the final order of the tribunal was made there was nothing paid to the parties declared entitled to the same; that pending inquiry the defendant absconded, and when arrested at some point in New York was passing under the name of Dr. Brown. Moreover, a witness introduced by the defendant, testified that upon one occasion the defendant went into the bank and drew a sum of money, and then enclosed a $1000 bill in an envelope which he subsequently delivered furtively to his co-receiver. This evidence was offered upon the theory that it tended to show a lawful disposition of the money, because his fellow-receiver was jointly entitled to the possession.

We do not so understand the powers, duties and obligations of a receiver. The real custody of the property is in the court of which he is a temporary officer by appointment. He has no personal control of the money, and can only pay it out, or invest it by the sanction of the court. From the facts, as related by the witness aforesaid, there being no single circumstance tending to show that it was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund.

(4) Among the refused prayers of the defendant is the following: "The law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in the consideration of the evidence." The defendant offered no evidence of good character. Assuming that he was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon, the one offered went much farther than that, for it requires in addition that he shall be presumed to be "an upright, honest man of integrity" also, throughout the consideration of the evidence. If such an instruction is required to be given, when demanded, there would be no occasion to introduce evidence of good character in any case. We are of the opinion, however, that the court is not required to give an instruction on anything that has not been put in issue. All that the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the Government to overcome that presumption by proof of guilt beyond a reasonable doubt. Such an instruction was given at the request of the defendant and repeated in the general charge. State *v.* Anslinger, 171 Mo. 489, 415; State *v.* Gartrell, 171 Mo. 600, 606; William *v.* People, 166 Ill. 132, 136.

The authorities relied on by the defendant do not go so far as to hold that the accused is entitled to such a charge as was asked, under all circumstances. McKnight *v.* U. S., 97 Fed. Rep., 210; Mullen *v.* U. S., 106 Fed. Rep., 892. In the first of those cases the judgment was reversed because the court permitted the District Attorney, over the objection of the defendant, to comment upon his failure to prove a good character; and in the second, the court, in refusing the instruction, made remarks decidedly prejudicial to the defendant, respecting his failure to offer similar proof.

(5.) The court, in the general charge, laid down the law applicable to the offence alleged in the third count, and the evidence that had been submitted.

9. We come now to the consideration of errors assigned upon exceptions taken to certain remarks made in the argument of Counsel representing the Government.

These contain much invective against the defendant. In commenting upon the case made against him, he was denounced as a common thief, and as one who had robbed the widow and orphan (who were among those claiming participation in the final distribution of the fund as preferred creditors of the Endowment Association).

Though, unfortunately, not uncommon in the course of the trial of closely contested cases, invective is always in bad taste. Where, however, it is founded on the evidence in the case on trial and relates to the final conclusion which that evidence tends to establish, its permission by the court does not amount to reversible error. State *v.* Gartrell, 171 Mo. 489, 512. The case cited is well considered, and the very point here made is ably discussed and, we think, properly decided. When the counsel went outside the case to say that "the defendant did not even try to prove a good reputation," the court promptly intervened saying that he did not have to, and that the remark should be withdrawn. Counsel then immediately withdrew the remark. No further action was asked of the court, and this is all that he could well have done under the circumstances. Lorenz *v.* U. S., 24 App. D. C. 337, 391; Yeager *v.* U. S., 16 App. D. C. 356, 362.

10. The last point for consideration arises on the recitals of the judgment imposing the sentence. This sentences the defendant to the penitentiary "there to be imprisoned and kept at labor for the period of five years." No forfeiture of the defendant's right or claim to his commissions, costs, and charges as receivers, was added to the sentence.

(1.) While Section 841 declares a forfeiture of a receiver's commissions and charges in cases of embezzlement of the funds in his possession, it is not a part of the punishment which the court, having jurisdiction of the offence, is authorized to impose, and it was properly omitted in entering the judgment upon the verdict, and fixing the penalty. If effective, the question of the forfeiture is for the determination of the Equity Court having jurisdiction in the matter of the receivership when the accounts thereof come on for final settlement.

(2.) Part of the penalty imposed by Section 841 is imprisonment not exceeding ten years, without the addition of the words "at hard labor," as is the case in some other sections defining and punishing offences. When those words are used it is proper for the sentence to so read. But where not used, the imprisonment, if for more than one year, may be in a state penitentiary regularly designated for the purpose. R. S. Sec. 5546. And when sentenced to be imprisoned in such a penitentiary the convicted person is subject to the same discipline and treatment as is provided for those sentenced by the courts of the state or territory in which it may be situated. R. S. Sec. 5539; *Ex parte* Karstendick, 93 U. S. 391, 399; *In re* Mills 135 U. S. 263, 266.

Whether hard labor constitutes part of the treatment and discipline of the penitentiary in which the appellant has been sentenced to be confined for five years, we need not undertake to inquire, though doubtless such is the fact. The words "at hard labor" included in this sentence were unwarranted as well as unnecessary, but it does not follow that the judgment must, on appeal therefrom, be declared void, or reversed with direction to grant a new trial. Raymond *v.* U. S. 25 App. D. C. 555, 562; S. C. on Second Appeal (Present Term).

Having the power to modify, as well as reverse a judgment appealed from the Supreme Court of the District, we shall, without further consideration of the point, modify the judgment and sentence so as to strike therefrom the words "at labor" as being, at least, mere matter of surplusage.

Having found no reversible error in the proceedings on the trial, the judgment will be modified as above indicated, and as modified will be affirmed.

Modified and Affirmed.

TUESDAY, *May 1st, A. D.* 1906.

No. 1633, April Term, 1906.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, modified by striking out therefrom the words "at labor," and as so modified, be, and the same is hereby, affirmed.

Per MR. CHIEF JUSTICE SHEPARD.

May 1, 1906.

TUESDAY, *June 7th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

On consideration of the motion for a rehearing in the above entitled cause, It is by the Court this day ordered that said motion be, and the same is hereby, overruled.

WEDNESDAY, *June 13th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

The petition for the allowance of a writ of error to the Supreme Court of the United States in the above entitled cause, was submitted

to the consideration of the Court by Mr. Henry E. Davis, on behalf of counsel for the appellant, in support of petition.

WEDNESDAY, *June 13th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

On consideration of the petition for the allowance of a writ of error to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said petition be and the same is hereby, denied.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Thomas M. Fields, Appellant, and the United States, Appellee, No. 1633, a manifest error hath happened, to the great damage of the said Thomas M. Fields as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of Appeals, District of Columbia. Filed Sep 4–1906. Henry W. Hodges, Clerk.

Know all men by these presents, That we, Thomas M. Fields, as principal, and The Title Guaranty and Surety Company, (of Scranton, Penna.), as surety, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars to be paid to the said United States of America, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, exectuors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of August, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Thomas M. Fields, Appellant, and the said United States, Appellee, No. 1633, a judgment was rendered against the said Thomas M. Fields, and the said Thomas M. Fields having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Thomas M. Fields shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

[Seal of The Title Guaranty & Surety Company.]

THOMAS M. FIELDS, [SEAL.]
THE TITLE GUARANTY & SURETY COMPANY, [SEAL.]
By WILLIS W. PARKER, [SEAL.]
Attorney in Fact.

FRANK J. HOGAN,
As to Both.

Approved Aug. 31st, 1906, by—
EDWARD D. WHITE,
Associate Justice Court *of the Supreme Court of the United States.*

[Endorsed:] No. 1633. Thomas M. Fields, Appellant, *vs.* United States. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Sept. 4, 1906. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein

Thomas M. Fields is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand nine hundred and six.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

Service accepted for the United States this 4th day of September A. D. 1906.

D. W. BAKER,
U. S. Attorney, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Sep. 4, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 96 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas M. Fields, Appellant, *vs.* United States, No. 1633, April Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals at the City of Washington, this 6th day of September A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,360. District of Columbia, Court of Appeals. Term No. 395. Thomas M. Fields, plaintiff in error, *vs.* The United States. Filed September 7, 1906. File No. 20,360.